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United States

OCTOBER TERM 1978

NO. 78-406

C. CAREY MATTHEWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment and Decision of the United States Court of Appeals, for the Fifth Circuit, entered on March 20, 1978, which affirmed an Order and Judgment of the United States District Court for the Southern Dis-

trict of Florida, dated October 13, 1976, denying the Amended Motion of Petitioner to Set Aside a Guilty Plea, Adjudication and Sentence, under 28 USC §2255. District Court Judge C. Clyde Atkins had previously, on August 5, 1975, denied Petitioner's Amended Motion to Vacate, Set Aside Sentence Adjudication and Guilty Plea, under §2255, but on June 9, 1976, the United States Court of Appeals, Fifth Circuit, had reversed the District Judge's Order of August 5, 1975, stating that Matthews was entitled to an evidentiary hearing on his claim, substantial inferences having been raised by his Petition and Exhibits, that threats of coercion had induced his guilty plea.

The U.S. District Judge held an evidentiary hearing, on September 2, 1976, but Petitioner contents that it was a farce and a denial of due process as well as the assistance of counsel under the Fifth and Sixth Amendments to the United States Constitution, because the two principal witnesses for the prosecution admittedly had coordinated their testimony prior to the hearing, rendering the exclusion of the witnesses under the Rules meaningless, and denying due process under the United States Constitution to the Petitioner.

Petitioner claims that as a result of the foregoing, that the alleged evidentiary hearing required by the Fifth District Court of Appeals, before the United States District Judge, C. Clyde Atkins on September 2, 1976, was, in fact, not an evidentiary hearing, but a recital of admittedly prearranged and prediscussed testimony by the principal witnesses for the Government, which violated the due process rights of the Petitioner under the Fifth Amendment to the United States Constitution and denied him the assistance of the counsel who had

represented him at the trial, by reason of the collusive testimony at the evidentiary hearing of September 2, 1976, of his prior counsel and his prior prosecutor, all in denial of his rights to the assistance of counsel under the Sixth Amendment to the United States Constitution.

OPINIONS BELOW

The Order denying Petitioner's Amended Motion to Vacate Plea, Adjudication and Sentence, dated August 5, 1975, is printed as Appendix "A" hereto.

The Opinion of the United States Court of Appeals, Fifth Circuit, dated June 9, 1976, reversing and remanding the said Order and Judgment of the United States District Court for the Southern District of Florida, but rejecting Petitioner's claims of error in that his *Alford* plea was accepted by the trial Court without a sufficient factual basis, is reported at 533 F.2d 900, and printed as Appendix "B" hereto.

The Order denying Petitioner's Amended Motion to Vacate Plea, Adjudication and Sentence, dated October 13, 1976, is printed as Appendix "C", hereto.

The Opinion of the United States Court of Appeal, Fifth Circuit, dated March 20, 1978, affirming the Order of the United States District Court for the Southern District of Florida, dated October 13, 1978, is printed herein as Appendix "D" hereto.

JURISDICTION

The Opinion of the United States Court of Appeals, Fifth Circuit, from which Certiorari is sought was entered on March 20, 1978, and the denial of a Rehearing on said matter, entered on May 11, 1978.

Jurisdiction of this Court is invoked under Title 28, USC §2101(c), and Rule 19(b), Supreme Court Rules.

QUESTIONS PRESENTED

1. Does the decision of the Fifth Circuit Court of Appeals of March 20, 1978, affirming the Order of the United States District Court for the Southern District of Florida, dated October 13, 1976, conflict with the Fifth Amendment to the United States Constitution by denying the Petitioner due process of law.

2. Does the decision of the Fifth Circuit Court of Appeals of March 20, 1978, affirming the Order of the United States District Court for the Southern District of Florida, dated October 13, 1976, conflict with the Sixth Amendment to the United States Constitution, by denying the Petitioner rights guaranteed by the Sixth Amendment to the United States Constitution, to be confronted with the witnesses against him, and to have the assistance of counsel for his defense.

STATEMENT

I. NATURE OF THE CASE

This Petition emanates from a portion of an Order, Judgment or Decision of the Fifth Circuit Court of Appeals, which rejected an assertion of fundamental constitutional error by Petitioner even though reversing and remanding for evidentiary hearing on another point, an Order of the United States District Court, Southern District of Florida, denying Petitioner's Amended Motion to Vacate and Set Aside Guilty Plea, Adjudication and Sentence Under 28 USC §2255, without an evidentiary hearing.

The plea, adjudication and sentence sought to be set aside was to a single Count of an indictment charging certain violations of the Securities and Exchange Act of 1933 and 1934.

The guilty plea was entered under *North Carolina vs. Alford,* 400 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160.

In his §2255 Amended Motion, Petitioner claimed not only that the Government had failed to establish a "sufficient factual basis under Rule 11," but also that his *Alford* plea was coerced by the fraud and deceit of the Assistant U.S. Attorney who conveyed through his defense attorney a false threat that the trial judge had threatened a ten year jail term, if he went to trial and was convicted; alternatively, if the prosecutor's denial be believed, the Petitioner was mislead and deceived by his own counsel, and thus denied the effectual assistance of counsel.

The Fifth Circuit Court of Appeals reversed the District Court's Order denying the Motion without evidentiary hearing, finding that the Petitioner's supporting third party Affidavits raised "a substantial inference that threats or coercion in fact induced Matthews' guilty plea." The Court's decision is included herein as Appendix "B".

Pursuant to the Order of Reversal and Remand by the United States Court of Appeals, Fifth Circuit, United States District Court Judge C. Clyde Atkins, set the cause for an evidentiary hearing on Thursday, September 2, 1976, and on that date, an evidentiary hearing was heard and evidence taken.

On October 13, 1976, the trial Court entered its Order denying the Amended Motion to Vacate Sentence.

The evidentiary hearing adduced facts that showed the very real importance of such a hearing, although the truth was obscured by the fact that the two principal witnesses, former prosecutor Neal Sonnett and former defense counsel, Irvin Block, held pre-hearing private meetings to "iron out" initial differences in their diametrically opposed Affidavits prior filed (App. 35, Affidavit of Block; App. 29, Affidavit of Sonnett).

Suffice to say at this point, that the aforesaid prehearing coordination of the testimony of two principal witnesses, one the former prosecutor and the other, the former defense counsel, as to the principal issue before the Court clearly made the hearing a farce and a travesty of justice, and a denial of due process as well as the assistance of counsel under the Fifth and Sixth Amendments to the United States Constitution.

Although the two witnesses were excluded from each other's presence solemnly by the Court at the time of their testimony, their pre-trial meetings to coordinate and orchestrate their testimony rendered the exclusion of the witnesses under the Rule, totally meaningless, and divested the Appellant of its due process rights under the Constitution.

Their collusive actions destroyed the opportunity of a fair hearing of which more will be said.

On March 20, 1978, the Circuit Court of Appeals affirmed the District Judge's Order denying the Petitioner's §2255 Petition.

In its Opinion, the Fifth Circuit Court of Appeals totally ignored the contentions of Matthews that he had been denied due process as well as the substantial assistance of counsel under the Fifth and Sixth Amendments of the United States Constitution, by reason of the fact that prior to the evidentiary hearing of September 2, 1976, the former Government attorney and his former defense counsel, the two principal witnesses at the evidentiary hearing, held pre-hearing private meetings, admittedly, to discuss their previously filed, directly contradictory Affidavits, and to reconstruct their testimony.

The Fifth Circuit Court of Appeals in its Opinion of March 20, 1978, made no reference to, and totally ignored, the due process allegations of the Petitioner, that there was no meaningful resolution of the conflict in the Affidavits between the two prior counsel since they had resolved the conflict outside the Court and prior to the hearing. Thus, Petitioner contended then and now

that it was not the trial Court which resolved the conflict, but that the conflict was resolved by the collaboration of the two attorneys who were the principal witnesses at the evidentiary hearing.

The constitutional questions raised by Petitioner in his appeal charging denial of the Fifth and Sixth Amendments and due process, were totally ignored by the Court in its Decision.

It is this denial and rejection of the constitutional rights of the Petitioner by both the United States District Court for the Southern District of Florida, and the Fifth Circuit Court of Appeals, which is the subject matter of Petitioner's request for Certiorari in the instant cause.

II. PERSONS INVOLVED

THE PETITIONER: C. CAREY MATTHEWS, former Colonel, U.S. Marine Corps Reserve; Combat Infrantry Commander at Iwo Jima and Korea; wounded three times in action. At 45 still a Reserve Colonel, he volunteered for airborne service and won the Airborne Parachutist insignia at the U.S. Army Infrantry School, Fort Benning, Georgia. A veteran of the 1st and 5th Marine Divisions and member of the 82nd and 101st Army Airborne Division Associations; in 1970 he received the Armed Forces League Distinguished Service Award for valuable service during the Vietnam period as the Commanding Officer of the 4th ANGLICO, USMCR, an elite parachute trained organization.

Petitioner was elected to the Florida Legislature in 1960 and served six terms until his resignation, due to the conviction of the charge herein involved. During this period, he was reelected to serve the people of Dade County six times, three without opposition and rose to the position of Majority Leader, Florida House of Representatives, and held that post at the time of the coerced plea hereinabove referred to.

Petitioner became a member of the New York Bar in 1949 and the Florida Bar in 1954. He held the honorary post of Special Assistant to the Attorney General of Florida for a number of years and served on various important committees of the Florida Bar.

THE RESPONDENT: The United States of America, as represented by the U.S. Attorney for the Southern District of Florida, and the Solicitor General of the United States.

III. THE CASE

Petitioner instituted an action under the provisions of 28 USC §2255, seeking to vacate and set aside Petitioner's Guilty Plea Adjudication and Sentence, previously imposed by the United States District Court for the Southern District of Florida.

On January 7, 1972, the Petitioner, C. Carey Matthews, hereinafter referred to as either Petitioner or Matthews, in the District Court of the United States for the Southern District of Florida, entered a plea of guilty to a single Count, charging him and others with certain violations of the Securities and Exchange Act of 1933 and 1934.

After having pled not guilty to all Counts of the said indictment and having concluded preparations for trial, on the eve of the trial, after negotiations between his counsel and counsel for the United States, Petitioner entered into an arrangement whereby he entered a plea of guilty to the aforesaid single Count.

At the time of entering the plea, Petitioner maintained his innocence, entering an *Alford* plea, and has at all times since the entry of the plea.

Subsequent events and discovery by the Petitioner led him to believe that his plea of guilty was fraudulently obtained through the coercion, threats, trickery and deceit of the Assistant United States Attorney handling this matter. Consequently, he brought his Petition, under 28 USC §2255, seeking to vacate and set aside the plea, adjudication and sentence imposed upon him. Petitioner was coerced into entering a guilty plea to

Count 14 of the indictment and tricked into doing so, by reason of what he now believes to be a false threat conveyed by the prosecuting attorney to Petitioner's counsel and through him to the Petitioner, that United States District Judge, Peter T. Fay, the trial judge, had conveyed the information and the threat that if Petitioner was going to trial, the other Defendants having taken pleas in exchange for favorable sentences, that the said Judge would sentence the Petitioner, if convicted, to at least ten years in prison.

Petitioner believed that such threats were true and never would have entered a plea of guilty to any Count, except that he believed he was to be denied an unbiased Court and was therefore, coerced into an involuntary guilty plea, while at all times asserting his innocence.

Matthews continued for some years after the entry of the plea and the sentencing to labor under the belief that the alleged threat of a ten year sentence communicated by the prosecuting attorney to Irwin Block, his attorney, and thereafter, to him and to his co-counsel, Philip Mandina, had actually been made by Judge Fay. It was not until a certain Wall Street Journal article referred to in his §2255 Motion was brought to his attention, in April of 1974, that he began to have doubts that the threat may not indeed have been genuine, but was part of a scheme to coerce him into pleading guilty in order to further the political aims of the prosecutor. The Article is Appendix "G".

The type of Judge and person the Honorable Peter T. Fay is, as well as his growing reputation for justice and fairness, further indicated to Matthews the possibility that such threat may never have been made.

The Petitioner finally became convinced by remarks made by Judge Fay at a hearing on January 10, 1975, on Matthews' Petition for Termination of Probation, that Judge Fay certainly could not have made such a threat. Fay denied the Petition, but stated:

> "I have serious doubts that I will ever take another plea under the *Alford* principle, because it's just a horrible, horrible situation and you end up with exactly what Mr. Matthews has ended up with. He has ended up with a five year punishment.
>
> "I am perfectly aware that probation is a punishment, a severe punishment in Mr. Matthews' case, because, as I understand it, he cannot practice law. It is a severe punishment.
>
> "Yet he has consistently professed that he is completely innocent. Under the *Alford* case, the plea can be accepted even with that situation, and I will stand by the statement I made then, at least that I think I made then, that the whole procedure is completely inconsistent with the administration of justice. There never has been and apparently there never will be, a true adjudication of whether this man is innocent or guilty of these charges that were brought against him."

It seemed inconceivable to the Petitioner, having heard those remarks, that Judge Fay would have made such a threat. As a result thereof, Petitioner filed his Motion under §2255, being convinced of Judge Fay's

sincerity and acting on Judge Fay's invitation to come forward.

The focus of the testimony at the hearing of September 2, 1976, dealt with the allegations of Matthews' sworn Amended Motion to Vacate Plea, Adjudication and Sentence, that his plea was coerced by information conveyed to him by his attorney, Irwin Block, that Neal Sonnett, the Assistant United States Attorney in charge of the criminal Division, had related to him that Judge Fay had told him that if Matthews went to trial alone, the other Defendants having already entered pleas of guilty, and if Matthews was convicted, he would be sentenced to at least ten years in prison.

The initial witness called was the same Neal Sonnett whose testimony watered down considerably his Affidavit filed prior in this cause in opposition to Petitioner's Motion, that unequivocally he had not conveyed such information to Block on the eve of trial. (App. 48, 49, 50).

Sonnett, stating from the stand that he had great respect for Block's integrity, character and truthfulness, testified that he "can understand" that something he said to Block, after a Pre-Trial Conference with Judge Fay, while Block waited outside Judge Fay's chambers, under the circumstances, could have given an impression that Judge Fay had made a statement that if Matthews did not plead guilty and was convicted after trial, he would draw a ten year sentence. (App. 48, 49, 50).

This testimony by Sonnett for the first time revealed an admission by the Government's former

prosecutor that a conversation had taken place between him and Block whose tenor was such that Block might have the impression from Sonnett that such a threat had been made or that such information had been conveyed to him from Judge Fay.

Both Sonnett and Block declined to characterize, at the hearing, this information as a "threat" but nevertheless, when the information was conveyed from Block to Matthews it was a direct threat of a 10 year prison sentence. In any event, that information, as Matthews testified, as Block stated and as Mandina, Matthews' former law partner testified, coerced or forced Matthews to plea guilty and he would have never entered such a plea, without that coercion. (App. 50-51).

No one denied or refuted Matthews' testimony that Block conveyed the promise or the threat of a ten year imprisonment to Matthews if convicted after trial. Matthews states it; Block and Mandina corroborate it; no one refutes it.

Now, for the first time at the evidentiary hearing, of September 2, 1976, Sonnett admitted that he may indeed have said something to Block after meeting with Judge Fay which could have given Block that impression, an impression which when conveyed to Matthews by Block took away Matthews' free will and coerced the entry of a guilty plea. (App. 48-50).

Block testified after Sonnett and he agreed, that after the Appellate hearing, before the United States Court of Appeals, Fifth Circuit, in this cause, he and Sonnett had met several times to discuss their prior Affidavits in this cause. (App. 48).

Block twice stated under oath, that the Affidavit which he, himself, had dictated and which is a supporting Exhibit to the Matthews' Petition (App. 35) was true, and that he did convey to Matthews the information that Sonnett had advised him that the Court had indicated to Sonnett that if Matthews went to trial and was convicted, he would draw a substantial sentence, in excess of ten years.

Also, Block stated that Matthews then decided to enter his plea of guilty rather than take the chance of being sentenced to ten years in prison.

He offered additionally, that whatever the exact language of Sonnett's statements to him, they caused him to understand that the Court had indicated to Sonnett that if Matthews was tried alone and was convicted, he would be sentenced to a ten year prison sentence, and he conveyed that information to Matthews.

Philip J. Mandina, Matthews' former law partner, testified and strongly supported the Petitioner's Amended Motion. His testimony closely parallels his Affidavit previously filed herein (App. 29).

His Affidavit, as well, had testified to Matthews' innocence of the charge to which he had entered the *Alford* plea. Mandina testified that on the eve of trial, he and Matthews had been preparing for the forthcoming trial in their offices, when Block called and that both Mandina and Matthews talked to Block on telephone extensions.

Matthews had already decided and determined, at this time, according to Mandina, to go to trial regardless

of the pressures being brought to bear on him, of Dobson's recanting on his promise to tell the truth to the Court and to testify as to Matthews' innocence and regardless of the offers being made by the prosecution through Block of leniency if he would enter a plea of guilty to any charge. (App. 56).

Mandina testified that Block on his pre-trial telephone call, which he placed on January 7, 1972, stated to him and to Matthews on the telephone extension that Block had just come from the discussion with Sonnett and that Sonnett had advised him that the trial Judge had conveyed to him that if Matthews went to trial and was convicted, he would draw a ten year prison sentence. (App. 53, 54, 55).

Matthews and Mandina were both stunned and Matthews stated to Mandina, according to his testimony, that he could not afford to take such a chance, because of his three children, one, three and four years old.

Matthews, then, under this coercion, according to Mandina, met Block in order to appear before the Judge and enter his plea which Mandina stated he would never have done except for the coercion of the message conveyed by Block from Sonnett. (App. 56).

Matthews then testified himself as a final witness during this proceeding.

His testimony corroborated and substantiated the details of the sworn Amended Motion to Vacate Plea, Adjudication and Sentence.

Matthews further testified that on the day when Block had conveyed the threat of the jail sentence to him, and he had finally decided by reason of this coercion alone to enter a plea of guilty, he met Block at the Courthouse to go before the Judge.

Several times, then, he asked Block if the information as to a ten year prison term had, indeed, been conveyed to him by Sonnett and Block said that indeed it had.

Matthews was then brought before Judge Fay and entered his plea under *Alford vs. North Carolina*, and was asked by Judge Fay the routine questions asked when a guilty plea is accepted, including whether or not he had been threatened or coerced into entering his plea.

He, not being under oath, stated that he had not been threatened or coerced.

Matthews testified that he had so stated on January 7, 1972, at the time of entering the guilty plea, had actually been the person who had made the threat to imprison him for ten years, if convicted at trial, on that very day, and he felt that if he revealed the threat in open Court that the Court would then be totally hostile, reject his plea, put him to trial, and if convicted, would sentence him to an even harsher term. (App. 58).

Furthermore, Matthews testified he knew of his own experience, which was almost entirely in State Courts, that the "guilty plea colloquy" where a plea is negotiated, was largely a charade where the Defendant has been promised a light sentence or a reduced charge in exchange for his guilty plea, but denies to the Court

on interrogation that any promises have been made to him, while the prosecutor and his own defense counsel, who have exchanged the promises on his behalf, look on in silence to his necessary untruth, which is part of the plea bargaining game.

This procedure is largely changed now, even in State Courts, but the practice prevailed on January 7, 1972.

In any event, neither Irwin Block, his attorney, or Neal Sonnett, the Chief Prosecutor, who had discussed on that very day the alleged statement by Judge Fay about giving Matthews a ten year prison term, said a word as to what had transpired between them, although both being officers of the Court, far more than Matthews, the Defendant, had a duty to step forward. In Block's case he owed the duty of "loyal counsel" under the Sixth Amendment.

Sonnett's duty as a prosecutor was, of course, more heavy, to the Defendant. His conduct in the Dobson and Zimmerman matters in the pre-trial preparation of the instant case and as evidenced by a certain Wall Street Journal article referred to in Matthews' later testimony (App. 21), showed conclusively that his only concern and interest was to obtain a conviction at any cost.

At the time of sentencing, the same situation prevailed as of the time of answering the guilty plea, and Matthews did not dare to reveal what he knew of the alleged threat by the trial Judge for fear of receiving an even harsher sentence if convicted after trial.

The prosecutor and the defense counsel likewise stood mute although it was they who had conveyed the so called threat or information to Matthews of the ten years prospective sentence. As Sonnett testified, something he had said "might have given Block that impression." (App. 48-50).

REASONS FOR GRANTING THE WRIT

Viewing the testimony presented at the Evidentiary Hearing, the Exhibits and Affidavits in this cause, a fair minded man could come to no other conclusion but that a threat had been conveyed to Matthews by his counsel on the eve of trial, that unless he did plea guilty, the trial Judge had indicated he would receive a ten year sentence, if convicted. It was unquestionably the basis on which Matthews entered his *Alford* plea.

Three men have sworn to it; Matthews, Block and Mandina, and even the Government prosecutor, lauding the character and truthfulness of Block, testified that he "can understand" that something he said to Block after a pre-trial conference with Judge Fay, while Block waited outside the Judge's Chambers, under the circumstances in question, could have given an impression to Block that the Judge had made the statement that if Matthews did not plea guilty and was convicted, he would draw a ten year sentence. In short, Sonnett's own testimony conceded that Block did convey such a message to the Petitioner.

As a matter of fact, this testimony by Sonnett was a departure and a watering down from his original Affidavit submitted by the Government and was an admission by him that a conversation had taken place between him and Block outside the Judge's Chambers, whose tenor as such that Block might have the impression, ("misimpression" Sonnett called it), from Sonnett that such a threat had been made or that such information had been conveyed to him from Judge Fay.

The initial Affidavits of both Block and Sonnett showed a clear-cut clash as to whether or not Sonnett did convey such a threat of a ten year sentence to Block. Block's Affidavit said he did; Sonnett said he didn't.

After the hearing before the Fifth Circuit Court of Appeals in re this §2255 Petition, Sonnett and Block both testified that they "got together" several times, to try to "reconstruct" this matter. The result of said "reconstruction" is that Block elaborated on his Affidavit by stating that he related to Matthews the impressions and implications that he received from Sonnett that the Judge indicated that Matthews would receive a severe sentence if he went to trial and did not plea guilty.

Most importantly, however, Block twice reiterated, under oath, at the Evidentiary Hearing, that the Affidavit which he, himself, had dictated and which is a supporting Exhibit to the Matthews' Petition, (App. 35), was true, and that he did convey to Matthews the information that Sonnett had advised him that the Court had indicated to Sonnett that if Matthews went to trial and was convicted he would draw a substantial sentence, in excess of ten years.

As pointed out in the testimony of Sonnett, Block is an extremely experienced, capable, and able, counsel. Certainly, Block was not a neophyte or novice, who would easily or erroneously come to a conclusion that information was being conveyed to him that the Petitioner would receive a specific sentence, i.e., a ten year sentence, unless he pleaded guilty.

The very existence in the purported message of a specific term of years, i.e., ten, makes it obvious that there was no vague allusion as to a harsh sentence from which Block was obtaining a "misimpression," but a direct statement of a ten year sentence.

As to what exact language of his might have given Block the impression that the Judge had indicated Matthews would receive a ten year sentence unless he pleaded guilty, Sonnett indicated that he didn't recall. What is certain, and what the evidentiary hearing did establish was, that a colloquy took place between Sonnett and Block, on the day of the plea, but prior thereto, outside the Judge's Chambers, after Sonnett had had a visit with the Judge to discuss the Petitioner's case and potential plea and sentence, without Block being present.

It was further established that after the conference, alone with the Judge, Sonnett stepped out of Chambers and in the hallway, and discussed with Block his conversation with the Judge.

It is established by the admissions of Sonnett, although he denied conveying the threat of a sentence, that some of the things he said to Block could have given Block the impression, "under the circumstances," that the Judge would sentence Matthews to a ten year sentence, if convicted after trial.

It is further clear that Block immediately called Matthews and Mandina and advised them that such information had been conveyed to him.

He stated, at the Hearing, that he conveyed this message in terms of the "impressions" he had obtained from his conversation with Sonnett. However, his Affidavit (App. 35), unequivocally stated:

> "On the eve of trial, the undersigned was contacted by Neal Sonnett, Assistant United States Attorney, and to the best of undersigned's knowledge, advised that the Court had indicated to him, Mr. Sonnett, that if Carey Matthews went to trial and was found guilty, he would be sentenced to a substantial term of years, the exact number of which Affiant does not remember today, but which he believes to be in excess of ten years.
>
> "Your Affiant immediately conveyed this information to Carey Matthews, who, thereafter decided to plea guilty rather than take the chance of being sentenced to the time indicated by the Assistant United States Attorney."

At the evidentiary hearing, Block was twice asked whether this Affidavit was true, which indicated a flat statement to him of the threat by Sonnett rather than simply "impressions."

In each case, to each question, Block answered that his Affidavit was true and that Sonnett said the Judge had said that if Matthews went to trial and was found guilty, he would be sentenced to a ten year term. One hour later, after receiving the message, the Petitioner entered his plea, coerced by the thought and by the threat that the trial Judge was hostile and would sen-

tence him to a ten year term if he did not plead guilty and was convicted.

The foregoing established facts show conclusively a misrepresentation or lure by the prosecution which induced this plea of guilty and is, on its face, reason to invalidate the plea.

By Sonnett's own admissions whatever the words were that he, the Chief of the Criminal Division, an extremely experienced prosecutor, spoke to Irwin Block, Petitioner's counsel, an equally experienced defense attorney, they were sufficient for Block to be advised that he was receiving information indicating that the Judge would harshly sentence Matthews if he did not plea guilty, and he immediately conveyed this information to his client which induced the plea. Certainly those words, whatever they may have been, which concededly Sonnett did say, were not stated without meaning or purpose in the context of a matter of such great import to a Defendant to which both of these attorneys owed heavy duties at law; one, that of loyal and effective counsel under the Sixth Amendment, the other: that a prosecutor owes to the Defendant and to the United States to see that a fair trial is accorded a Defendant, under the "fundamental fairness" doctrine. A message, however, conveyed from prosecutor to defense counsel of such a nature as testified to herein could only have one meaning or one purpose, i.e., to induce, lure and pressure the Defendant to enter a plea of guilty.

The prosecutor had to know that such a message, however conveyed, must, of necessity, be relayed from counsel to his client. The message was relayed, and

therein lies the misrepresentation, duress and coercion which rendered this plea invalid.

Such a promise of differential sentencing, conveyed deliberately, by whatever means or words from the prosecutor to the experienced defense counsel, specific enough to contain the phrase, "a term of ten years," is per se coercion, invalidating the guilty plea.

This has long been established in American Federal case law, stemming back to and beyond the landmark and often quoted citation of the *United States vs. Tateo*, 214 Fed.Sup. 560. That cause involved a proceeding on a Motion to Vacate a Judgment of conviction on the ground that the Defendant's plea of guilty had been coerced.

The District Court held, inter alia, that where the trial Judge announced that in the event of a conviction he would impose consecutive sentences and based on such statement, Defendant's counsel advised the Defendant thereof so that he might receive a substantially lesser sentence by pleading guilty, and Defendant did then plead guilty, that said plea was not voluntary and his Motion to Vacate was granted.

Importantly, the Court held that even though the trial Judge's statement was not designed to mislead the Defendant or to induce his plea of guilty, that the lack of design was immaterial, since the question was whether the statement did have that impact on the Defendant.

The Court stated in *United States vs. Tateo*, S.D. New York 1963, 214 Fed.Sup. 560, 567:

"No matter how henious the offense charged, how overwhelming the proof of guilt may appear, or how hopeless the defense, the Defendant's right to continue with his trial may not be violated. His constitutional rights require the Government to proceed to a conclusion of the trial and to establish guilt by independent evidence should not be exercised under the shadow of a penalty — that if he persists in the assertion of his right and is found guilty, he faces in view of the trial Court's announced intention, a maximum sentence, and if he pleads guilty, there is the prospect of a substantially reduced term. *To impose upon a Defendant such alternatives amounts to coercion as a matter of law.*"

(Emphasis Supplied)

In short, the rule of *Tateo* quoted and cited as authority by the Fifth Circuit in *Thomas* is that offering or threatening alternatives as to differential sentencing if a Defendant does not plead guilty, is coercion as a matter of law, when conveyed to a Defendant, whether or not the Court or the prosecutor conveying the information does so, with the design to place upon the Defendant such a coercion.

From the testimony revealed at the Evidentiary Hearing, in the instant cause, it would appear that there was a deliberate design by the prosecutor to place such coercion upon the Defendant, through the information conveyed by whatever means, to his defense counsel, at the pre-trial bargaining meeting between the two attorneys.

Certainly the record herein reveals that the Government prosecutor conveyed sufficient information to Block, a highly experienced and able counsel to lead him to believe, deliberately or otherwise, that the trial Judge had threatened a ten year sentence to Matthews if he did not plead guilty and was convicted.

Sonnett says that some remarks of his which he cannot specifically recall, may have given this impression to Block.

If, in fact, the Court did not believe that Sonnett had either flatly stated or by clear statements given an experienced lawyer like Block such an impression, you can only conclude that Matthews had been misled and deceived by his own counsel. If such were true, the Court must conclude, of course, under the United States Constitution, definitely and certainly, Matthews would have been denied the effective assistance of loyal counsel and denied due process.

This would then not be a situation where there was some contention that the defense counsel was inept or incompetent, the situation would be one of absolute disloyalty where defense counsel simply misled and deceived his own client desiring to push him into a plea of guilty.

As the Fifth Circuit Court of Appeals stated in *MacKenna vs. Ellis,* 280 F.2d 592, in granting habeas corpus to a prisoner:

"He is entitled to the effective wholehearted assistance of counsel and to the undivided loyalty of counsel."

Obviously, the entire fundamental fairness required in accepting a plea under due process would be vitiated if the Defendant's own counsel deliberately misrepresented to him that threats had been conveyed to him of a harsh sentence from the Judge, through the prosecutor.

It would be disheartening to believe that is the situation in the case at bar, but the actions of Block in holding pre-hearing meetings with Sonnett to coordinate their testimony casts serious doubt on his conduct and merits close attention by this Court.

In essence, since the most important issue to be heard, as directed by this Court, was to "resolve the conflict" between the Affidavit of Sonnett and Block in this cause, the pre-trial meetings between the two, to discuss their Affidavits and Testimony, and to "reconstruct" the question, rendered the hearing only a post mortem and a farce, since their collusive testimony was already agreed upon.

Of little use indeed, was the invoking of "the rule" at the hearing so that Sonnett and Block could not hear each other's testimony! The entire spirit if not the letter of the Federal Rules of Evidence was violated. The Advisory Committee note as to Rule 615 states: "The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy and collusion." (Citing Wigmore §§1837-1838).

The pre-hearing coordination of testimony by Sonnett and Block, condoned by the trial Court, rendered

the hearing a nullity, and denied due process to the Appellant.

Another aspect of Block's conduct in re this hearing that merits attention, is Block's insistence that his secretary had actually not sworn him in at the time he signed the Affidavit appended to the Appellant's original Petition, charging Sonnett with *directly* coming to him, with an unequivocal threat supposedly from the trial Judge of a ten year jail term if Matthews did not plead guilty and was convicted.

Florida Statute 117.09 makes such a false notarial certificate a felony, and to participate as a party to such a certificate, also felonious.

Block also knew the purpose for which Matthews had requested the Affidavit from him, to support this Petition to Vacate Sentence.

He apparently was motivated to an extreme extent with a desire to avoide any perjury charge by reason of his factual support by sworn Affidavit of Matthew's contentions of a directly conveyed threat.

This agitation apparently led to the out-of-Court pre-trial meetings between Block and Sonnett to "reconstruct" the situation and to resolve the conflict between the Affidavits of the two which, of course, made the hearing a mockery of justice. The purpose, as a full reading of their testimony shows, was to protect each other. That protective coating, a result of their prehearing reconstruction now forever obscures the truth and denies the Appellant a fair hearing and due process.

Clearly and certainly, Block conveyed to Matthews the message that the prosecutor had advised him of a threat of a harsher sentence from the Judge i.e., a specific term of ten years.

Sonnett himself does not deny that such a conversation took place, and that words which he stated he "cannot recall" may have given such a "misimpression" to Block. Certainly whatever the words specifically stated by Sonnett were to Block, they were of sufficient clarity and were unambiguous enough that Block believed a definite sentence, i.e., ten years would be imposed, if Matthews did not plead guilty.

This was not inept or incompetent defense counsel. No vague allusion would have been misunderstood or misinterpreted by him.

One can only logically conclude therefore, that Sonnett's remarks, in re the Judge's sentence in this cause were sufficiently strong enough and explicit enough to fairly give Block the belief that the trial Judge had made such a remark.

Block certainly and obviously, as we know from the Evidentiary Hearing, did not make the statement up out of whole cloth. From the initial Affidavit submitted by Sonnett one would have been led to believe that. Herein we see the value and the need of an Evidentiary Hearing to an accused and to a Defendant.

We know now, and the Court knows now, that such remarks were made by the prosecutor to Block.

That Sonnett as prosecutor had a duty to refrain, under the circumstances of the plea bargaining as he did from the trial judge's office, from conveying to Block, the defense counsel, the clear impression that the judge had promised a harsh sentence if the Defendant did not plead, is clear, is obvious and is well known.

The duty of a prosecutor in such a situation has been spelled out in no uncertain terms in a landmark decision by our own Fifth Circuit Court of Appeals, in *Ginsberg vs. United States,* 257 F.2d 950, another case originating in the United States District Court for the Southern District of Florida. The Court said:

> "A United States District Attorney carries a double burden; he owes an obligation to the Government, just as any attorney owes an obligation to his client to conduct his case zealously but he must remember also that he is a representative of a Government dedicated to fairness and equal justice to all and, *in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that the Anglo-American Criminal Law rests on the foundation: better the guilty escape than the innocent suffer. In this case, zeal outran fairness.*"
>
> (Emphasis Supplied)

Certainly in the context of the instant cause, the prosecutor had the duty and the obligation to the accused in the interest of fairness to assure that no language of his could fairly and reasonably give defense counsel the right to believe that the trial judge had

made such a threat of a harsh sentence as that revealed by the evidence herein.

In the context of his Petition, it must be recognized that he has consistently professed his innocence to these charges even while pleading guilty under the duress which the testimony here has revealed.

The testimony of the prosecutor alone at the evidentiary hearing is and should be, sufficient under the "fundamental fairness" doctrine of our Constitution to mandate the withdrawal of the plea in this cause and the opportunity for trial which is his constitutional right.

In the alternative the Petitioner submits that if, as the Government contends there was no threat conveyed by Sonnett to Block, then Matthews was denied his Sixth Amendment right to effective assistance of counsel. If, in fact, no threat was conveyed to Block by Sonnett, it *must* have been Block that misrepresented to Matthews that a threat was made (based upon the uncontradicted evidence that Block conveyed to Matthews the threat of a ten year sentence). Based upon such misrepresentation, and a denial of Matthews Constitutional rights, the Appellant submits that the Order of the Trial Court should be reversed.

It is well settled in this Court, in granting habeas corpus to a prisoner, that the Defendant is entitled to the "effective, wholehearted assistance of counsel and to the undivided loyalty of counsel." See *Mackenna vs. Ellis*, 280 F.2d 592.

Obviously, the due process right of the Defendant would be violated if the Defendant's own counsel deliberately misrepresented to him that threats had been conveyed to him of a harsher sentence from the Judge, through the prosecution.

CONCLUSION

The undisputed evidence presented at the evidentiary hearing, revealed that the most important issue to be heard, as directed by this Court, i.e., the "resolving of the conflicts" between the Affidavits of prosecutor Sonnett and defense counsel, Block, was permanently obscured by prehearing meetings, held between the two, to discuss their Affidavits and their testimony in regards to the same to be held at the evidentiary hearing, and to "reconstruct" and then resolve the conflict, rendered the evidentiary hearing only a post mortem to their out-of-Court coordination meetings, and a farce, denying due process to the Appellant.

The prehearing coordination of the testimony of Sonnett and Block at the evidentiary hearing, condoned by the trial Court, rendered the hearing a nullity, and evidenced a denial to the Appellant of the services of loyal counsel under the Sixth Amendment of the Constitution of the United States.

Accordingly, the decision of the Fifth Circuit of March 20, 1978, affirming the Order of the United States District Court for the Southern District of Florida, dated October 13, 1976, conflict with the Fifth Amendment to the United States Constitution by denying the Petitioner due process of law and conflict with the Sixth Amendment to the United States Constitution, by denying the Petitioner rights guaranteed by the Sixth Amendment to the United States Constitution, to be confronted with the witnesses against him, and to have the assistance of counsel for his defense.

By reason of the foregoing, the relief sought herein by the Petitioner should be granted, and the Writ of Certiorari should be issued forthwith.

Respectfully submitted,

LAW OFFICES OF
LEO GREENFIELD, P.A.
1608 N.E. 135th Street
North Miami, Florida 33181
Attorneys for Petitioner

By_____
Leo Greenfield

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was this ____day of September, 1978, mailed to:

LLOYD G. BATES, ESQ.,
U.S. Attorney
Ainsley Building
Miami, Florida

and

OFFICES OF THE
UNITED STATES ATTORNEY GENERAL
WASHINGTON, D.C.

By _____
Leo Greenfield

Supreme Court, U. S.
FILED
SEP 11 1978
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

OCTOBER TERM 1978

NO. 78-406

C. CAREY MATTHEWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAW OFFICES OF
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APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 75-1134 CIV-CA

FILED
AUGUST 5, 1975

JOSEPH I. BOGART, CLERK
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI, FLORIDA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. CAREY MATTHEWS,
Defendant.

ORDER OF DISMISSAL

Petitioner, C. Carey Matthews has filed this Motion to Vacate and set aside sentence and adjudication and guilty plea pursuant to 28 U.S.C. 2255.

The Petitioner entered his guilty plea to Count 14 of a multi count indictment on January 7, 1972 before the Honorable Peter T. Fay being case No. 71-606 CR-PF. The plea was entered after a plea bargain in compliance with the standards set forth by the ABA. The agreement was basically that if the petitioner entered a plea to

Count 14 the remaining counts would be dismissed by the government. The government further agreed to recommend that petitioner be given a probationary period of five (5) years and not any incarceration, and the government further agreed to recommend that no fine be imposed upon the Petitioner.

The plea was entered per the provisions of the United States Supreme Court decision of *Alford v. North Carolina,* 400 U.S. 25 (1970).

The two grounds set forth in this petition are:

1. That the plea of guilty was coerced.

2. That the sentence, adjudication and guilty plea were in violation of Rule 11, in that a proper factual foundation had not been laid, as required by law.

As to ground one the Petitioner alleges his plea of guilty "was an involuntary act because of a threat conveyed to Matthews and in the belief that the Trial Judge Peter T. Fay, had conveyed through the prosecuting attorney, to movant's counsels and to movant, information that if the movant was going to trial, the other defendants having taken pleas in exchange for favorable sentences, that the said Judge 'would sentence movant, if convicted, to at least ten (10) years in prison.

This matter came up for hearing before the Honorable Judge Fay on June 13, 1975 and after hearing the subject matter of this present motion recused himself from consideration of this motion to vacate and the petition was sent to the Clerk for reassignment.

This petition was filed June 10, 1975 and the Petitioner states that he did not present this issue to the Court until this date as the first doubt he had that Judge Fay had not made the alleged threatening statement as conveyed to petitioners by the United States Attorney was when the Petitioner read a newspaper article April 24, 1974 and that this doubt was further substantiated because of the interest in justice manifested by Judge Fay during a January 10, 1975 hearing held on Petitioner's motion to terminate his probation.

In weighing the merits of petitioner's claims this Court considered the fact the Petitioner was an able attorney who was admitted to practice before both the Florida Bar and the New York Bar. Upon a close examination of the transcript of the entering of the plea this Court can only determine that it was freely and voluntarily given and the Court received the plea in full compliance with Rule 11 of FRCP and tenants of *Alford v. North Carolina.* At page 3 of the sentencing transcript it recites the following:

"THE COURT: Within the purview of that case, do you make this decision, though, freely and voluntarily?

MR. MATTHEWS: Yes, I do, Your Honor. I think that I have been treated with great courtesy by counsel.

MR. SONNETT: Thank you."

The above Mr. Sonnett being the same Assistant United States Attorney that Petitioner sets forth in this petition was the person who coerced the plea of guilty through fraud, deceit, trickery and coercion.

In two recent decisions of the Supreme Court of the United States; *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); and *McCarthy v. United States,* 394 U.S. 315, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1968) the essence of these decisions being that the sentencing Judge must quiet his doubts regarding the plea, and that a clear record of the proceedings be established. The Supreme Court has not mandated guidelines beyond those imposed by the Federal Rules of Criminal Procedure 11.

There is no claim by the petitioner that a plea bargain was not fulfilled to bring this case within the decision of *Santobello v. New York,* 1971, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 or even in a later United States Fifth Circuit Court of Appeals decision *Bryan v. United States,* 492 F.2d 775 (5th Cir. 1974) an en banc decision which arose from a pro se motion presenting a similar question as the one presented in this petition.

The Court of Appeals said:

> "Bryan had his day in Court on the issue of whether a bargain had been connected with his plea. Both he and his counsel denied that a bargain was involved 'directly or indirectly'. Section 2255 itself proscribes successive motions for similar relief and in the spirit of that bar we hold that record's positive 'no bargain' affirmation precludes the necessity to retry the issue."

In the *Bryan* case the court clearly stated that it is one thing to consider a silent record and another to consider an issue such as this where the record clearly

speaks for itself and the contention of a petitioner raises questions of the involuntariness of a plea. Again in the present case coercion was emphatically denied by petitioner and his attorneys standing with him, the trial court couldn't have given the petitioner more of an opportunity to speak. It is also clear from the record of the taking of the plea and subsequent appearances by the petitioner before the trial judge that the judge was most symphatic to the petitioner and gave him no cause to fear the bringing of any matter before the court.

The question such as raised by this petition was further settled by the courts when in *Frank v. United States,* 501 F.2d 173 (5th Cir. 1974), the court said:

> . . . . "Frank, like Bryan, testified without conflict or equivocation that no plea bargain had been made or promised, directly or indirectly . . . . We find this factor controlling in this appeal, and leave to other cases the determination of prisoner motions in the face of records silent on plea bargaining or indicative of specific motives to disclaim plea bargaining."

From an examination of the record by this court, it is clear that all of the facts brought out in this petition were known to the petitioner at the time of making the plea and that his plea at the time and under the specific facts of this case this course can only conclude that the plea when made was freely and voluntarily made by the petitioner. In *Alford,* Supra it was held that even if the plea was entered out of a fear of the possibility of a death sentence it would not afford a basis for relief. *Parker v. North Carolina,* 397 U.S. 790 (1970); *Brady v. United States,* 397 U.S. 742 (1970).

We now consider Petitioner's second contention, that there was not sufficient factual basis established for the plea. The determination of whether there is a factual basis for a plea of guilty need not rest solely upon evidence presented by the government; certainly the court is permitted to consider the Petitioner's testimony in making this determination.

The transcript of the taking of the plea and establishing factual basis recites the following beginning with page 8:

A. David A. Ross; I am a trial attorney with the Securities and Exchange Commission, Washington, D.C.

Q. Mr. Ross, in connection with your official duties, have you had occasion to conduct an investigation concerning Mr. Matthew's relationship to the State Fire and Casualty Company?

A. Yes.

Q. With regard to Count 14, which charges a securities law violation that occurred on or about January 10, 1968, would you please state the results of your investigation.

A. During the course of our investigation, after reviewing of documents and interviewing of witnesses, we determined that Mr. Matthews caused the mails to be used to distribute a proxy statement to State Fire stockholders on or about January 10, 1968,

which statement did not include certain material information regarding activities of Capital Bancshares and people connected with State Fire. This was in connection with a proposal to postpone a recapitalization plan for State Fire.

Q. What was Mr. Matthew's position with State Fire and Casualty Company at the time that proxy went out?

A. Mr. Matthews, our investigation showed, was the general counsel to State Fire, a director, a nominee for director, and I think that was it at the time, or possibly a vice president of State Fire.

Q. Are the factual allegations, as contained in Count 14, those that have been established by your personal investigation, interviews with witnesses, examination of corporate records and other records?

A. Yes.

Mr. Sonnett: We have nothing further at this time, your Honor.

THE COURT: Any cross-examination of this witness?

MR. BLOCK: No, your Honor.

THE COURT: Thank you, sir.

(Thereupon the witness was excused).

THE COURT: Anything else from either party?

MR. SONNETT: Just to clear up the record, I previously announced that at the time of sentencing the Government would dismiss the remaining counts of the indictment.

THE COURT: Yes. That was part of the agreement, as I understand it, and as I wrote it down.

MR. BLOCK: We have nothing further, Your Honor.

The trial court made inquiry factually precise enough to be within the ambit of the charges made against him and without any objections, deletions or additions requested by Petitioner or his attorneys. *United States v. Bethony*, 489 F.2d 91 (5th Cir. 1974). All parties involved in this matter agreed that to try the case could take weeks if not months and would defeat the motivation for plea bargaining and pleas of guilty. The requirements of the court is that the inquiry be factually precise enough and sufficiently specific to develop the defendant's conduct on the occasion involved was within the ambit of that defined as a criminal. *Jimenez v. United States*, 487 F.2d 212, (5th Cir. 1973).

The Petitioner had a hearing before the trial judge on his Petition for Termination of Probation on January 10, 1975 and during that hearing reiterated sufficient oc-

currences on his part to have established factual basis for his plea and this was still three years after his plea was entered and accepted by the court. At page 20 of his January 1975 hearing petitioner said:

> "Nevertheless, I understand that there were certainly various mistakes that I would not repeat in connection with the case. I would be a lot more suspicious and distrusting of persons for whom I was working and I have learned a good deal from the probationary period and everything that has ensued subsequent to it.
>
> I certainly would never take a job as a director or officer of a company that I knew very little about and as to which I knew practically nothing of the owners, particularly a public company. It's a grave mistake, because you become in a sense, in the sense of the Securities and Exchange Act — you become responsible as a director and an officer for everything they do.
>
> I recognize that far more fully and clearly than I did then."

The record clearly refutes petitioner's claims that his guilty plea was not entered freely and voluntarily with a full understanding of the nature and consequences thereof. The record clearly establishes that the petitioner understood the nature of the charge, that he entered his plea freely and voluntarily with a full understanding of the plea and there was a factual basis for the plea.

Under these circumstances it is unnecessary to require an evidentiary hearing to resolve petitioner's claims. *Traber v. United States*, 466 F.2d 483 (5th Cir., 1972); *Hunter v. United States*, 449 F.2d 156 (5th Cir. 1971).

For these reasons, it is

ORDERED AND ADJUDGED that the Motion to Vacate Sentence be and the same is hereby DENIED, and that this cause stands DISMISSED.

DONE AND ORDERED at Miami, Florida, this 2nd day of August, 1975.

/s/ Signature Illegible.
UNITED STATES DISTRICT JUDGE

cc: Bernard Hunter, Est.
1680 N.E. 125th Street,
North Miami, Florida 33181

Lloyd G. Bates, Jr.
Assistant U.S. Attorney
300 Ainsley Building
Miami, Florida

APPENDIX "B"

C. Carey MATTHEWS,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Respondent-Appellee.

No. 75-3497.

United States Court of Appeals,
Fifth Circuit.

June 9, 1976.

Motion was filed to vacate and set aside guilty plea on ground that it was coerced by reason of alleged threat from the trial court that defendant would receive at least a ten-year sentence if he did not plead guilty, which threat allegedly was conveyed by the prosecutor to movant's counsel and through that counsel to movant. The United States District Court for the Southern District of Florida, C. Clyde Atkins, J., denied motion without an evidentiary hearing, and movant appealed. The Court of Appeals, Dyer, Circuit Judge, held that although at time of sentencing movant stated that plea was not induced by any threats or coercion and although his counsel indicated that he had nothing to add to the proceedings, movant was entitled to an evidentiary hearing in view of counsel's sworn affidavit substantiating allegations that threatening statements had been made to him by the prosecutor, sworn affidavit of defendant's law partner stating that he was privy to such con-

versations and sworn affidavit of prosecutor that he did not make any such statements to counsel.

Reversed and remanded.

1. Criminal Law — 997.16(5)

Although at rule 11 colloquy defendant stated that guilty plea was not induced by threats or coercion, defendant was entitled to evidentiary hearing on motion to vacate and set aside plea on ground that it was coerced by reason of alleged threat from trial court that defendant would receive at least a ten-year sentence if he did not plead guilty where petition was supported by counsel's sworn affidavit substantiating allegation that such threatening statements had been made as well as sworn statement of defendant's law partner that the latter was privy to such conversations and sworn affidavit from the prosecutor denying any such statements. Fed.Rules CrimProc. rule 11, 18 U.S.C.A; 28 U.S.C.A. §2255.

2. Criminal Law — 997.16(5)

Allegations of a petitioner accompanied by his own affidavit are insufficient to mandate an evidentiary hearing on a petition to vacate and set aside guilty plea as being involuntary in face of a record, as made at time of guilty plea, detailing statements by petitioner that his plea was not induced by any threats or coercion. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.; 28 U.S.C.A. §2255.

3. Criminal Law — 997.11

It is not improper to refer to magistrate for his recommendation petition seeking to vacate and set aside guilty pleas. 28 U.S.C.A. §2255.

Appeal from the United States District Court for the Southern District of Florida.

Before DYER, SIMPSON and RONEY, Circuit Judges.

DYER, Circuit Judge:

[1] The sole question before this Court is whether the district court erred when it denied Matthews' motion under 28 U.S.C.A. §2255 to vacate and set aside his guilty plea without an evidentiary hearing. We conclude that under the particular facts or this case, an evidentiary hearing was required. We therefore reverse and remand.

Matthews was charged with multiple violations of the Securities Act of 1933, and the Securities and Exchange Act of 1934. After initially pleading not guilty to all counts, Matthews withdrew that plea and, pursuant to *Alford v. North Carolina,* 1970, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162, he entered a plea of guilty to one count, notwithstanding his continuing assertions that he was innocent of the charges brought against him. The remaining counts were dismissed.

The Section 2255 petition alleged that Matthews was coerced into entering the guilty plea by reason of a threat conveyed by the Assistant United States Attorney heading the prosecution team to Matthews' coun-

sel,[1] and through that counsel to Matthews. The substance of the allegation related to a private conference between the Assistant United States Attorney and the district judge. Since all other codefendants had entered guilty pleas, and since the trial promised to be long, the district judge is alleged to have stated in this conference that Matthews would receive at least a ten year sentence if he did not enter a guilty plea and was subsequently found guilty by a jury. The petition states that this information was relayed to Matthews' counsel by the Assistant United States Attorney, and by Matthews' counsel to Matthews. Important to the outcome of this case, the petition was supported by a sworn affidavit signed by Matthews' counsel, substantiating the allegation that these statements were made to him by the Assistant United States Attorney. A sworn affidavit was also filed by Matthews' law partner, stating that he was privy to the conversation in which Matthews' counsel related these threats to Matthews. Subsequent to the filing of the petition, the government filed a sworn affidavit signed by the Assistant United States Attorney, stating that he had never had such a private conference with the district judge, and that he had never conveyed these statements to Matthews' counsel.

Faced with these conflicting sworn affidavits, the district court[2] nevertheless denied Matthews' Section 2255 petition without an evidentiary hearing on the basis of this Court's en banc decision in *Bryan v. United States*, 5 Cir. 1974, 192 F.2d 775. The district court

[1]Matthews is represented on the Section 2255 motion by different counsel.

[2]The district judge who received the guilty plea recused himself from consideration of the Section 2255 petition, and the petition was assigned to another judge.

noted that at the time of sentencing, a full Rule 11 colloquy took place, and Matthews there stated that his plea was not induced by any threats or coercion. His counsel, the same attorney alleged to have received the threat, was also present at the Rule 11 hearing, and, although not addressed directly by the court, indicated that he had nothing to add to the proceedings. In the view of the district court, *Bryan* precluded Matthews from challenging statements made by him in the plea proceeding so as to gain Section 2255 relief. Since he was bound by those statements, no evidentiary hearing was required, and the court could only conclude that his plea was freely and voluntarily entered.

In *Bryan*, this Court en banc drew a balance between the Section 2255 requirement that an evidentiary hearing is necessary unless the motions, files, and records of the case "conclusively show" that the prisoner is entitled to no relief, and the need for finality in the criminal process. As stated in *Bryan*, if a prisoner could challenge prior statements made at a Rule 11 hearing without limit, then

> the number of hearings which a wilful affiant could provoke as to a single conviction would be limitless, for each time he could swear that someone at the last preceeding hearing suborned false testimony from him or his lawyer or that the judge played false in the performance of his duties.

492 F.2d at 780. In reaching this balance, the court *did not* conclude that a Section 2255 petition could never challenge statements made at a prior plea proceeding. As this Court has stated:

> We do not view the foreclosure principle set forth in *Bryan* to constitute an absolute and ironclad rule that the "magic words" of the Bryan-Rule 11 examination completely eliminate the necessity for a hearing on a §2255 motion in all circumstances.

Vandenades v. United States, 5 Cir. 1975, 523 F.2d 1220, 1224. Rather, the Court carefully compared the facts before it to the precepts of the Supreme Court laid down in *Fontaine v. United States*, 1973, 411 U.S. 213, 93 S.Ct. 1461, 36 L.Ed.2d 169, and *Machibroda v. United States*, 1962, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473, both of which required an evidentiary hearing under the "conclusively show" standard of Section 2255. The Court pointed to several characteristics which distinguishes *Bryan* from *Fontaine* and *Machibroda*. First, *Bryan* did not involve allegations of threats or coercion which induced the plea, as in *Fontaine* and *Machibroda*. Second, unlike those two cases, *Bryan* supported his petition with only his own affidavit to counter directly inconsistent former testimony. Thus, *Bryan* is inapposite to the case now before us, where the petition alleges threats which coerced the plea, and where the petition is supported not only by the affidavit of the petitioner, but also by the affidavits of third persons. *See Vandenades, supra*, 523 F.2d at 1224, fn. 6.

[2] Subsequent to *Bryan* we have held that its principles are not limited to situations involving a traditional plea bargain, but that those principles also apply to a Section 2255 petition which alleges that the guilty plea was induced by threats or coercion. In this later situation, under the rationale of *Bryan*, the allegations of the petitioner accompanied by his own affidavit

are insufficent to mandate an evidentiary hearing in the face of a Rule 11 record detailing statements by the petitioner that his plea was not induced by any threats or coercion. *United States v. Barrett*, 5 Cir. 1975, 514 F.2d 1241; *Jackson v. United States*, 5 Cir. 1975, 512 F.2d 772.

Subsequent decisions have also held, however, that *Bryan* does not apply to eliminate the requirement of an evidentiary hearing when the petition is supported not only by the allegations of the petitioner, but also by credible third party affidavits or other documentary evidence. *Dugan v. United States*, 5 Cir. 1975, 521 F.2d 231; *Vandenades, supra*.

In *Dugan*, petition alleged an unkept plea bargain and was supported by affidavits of a county deputy and sheriff, stating that both state and federal officials had made promises to Dugan that he would receive a sentence of only four years. At the plea proceeding, the court questioned Dugan as to whether any promises had been made in connection with the guilty plea, and Dugan replied in the negative. This Court concluded that the existence of the supporting affidavits, rather than the negative response elicited at the plea proceeding, was controlling, and an evidentiary hearing was necessary to resolve Dugan's claim. The rationale of *Bryan* was found to be inapplicable when third party affidavits accompanied the petition:

> While allowing a petitioner to obtain an evidentiary hearing by merely alleging an unkept plea bargain would enable a wilful affiant to provoke as to one conviction endless hearings for each time he could swear that someone

at the last hearing suborned false testimony, *such rationale for denying a hearing does not control here.* See *Bryan v. United States*, 492 F.2d at 780. When the petitioner presents affidavits from third parties, the danger of repeated hearings no longer exists. . . . When petitioner goes beyond mere allegations by presenting credible affidavits that raise a substantial inference that an unkept bargain was in fact made, §2255 requires an evidentiary hearing.

521 F.2d at 233. *See also Vandenades v. United States*, *supra*, at 1223 ("when the record discloses other credible documentary evidence which indicates a right to relief an evidentiary hearing may be necessary").

The case before us is controlled by *Dugan*. Here, we have affidavits that raise a substantial inference that threats or coercion in fact induced Matthews' guilty plea. Of course, we make no attempt to resolve the conflict in the affidavits before us, nor do we intimate any view as to whether Matthews would be entitled to withdraw his plea if the allegations of his petition are in fact correct. But, as decided in *Dugan* those affidavits tip the balance drawn by *Bryan*. Matthews is entitled to an evidentiary hearing on his claim.

[3] Matthews also claims that there was an insufficent factual basis for the entry of this *Alford* plea. Further, he challenges the local procedure whereby Section 2255 petitions are referred to the magistrate for his recommendation. We find these assertions of error without merit.

REVERSED AND REMANDED.

APPENDIX "C"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 74-1134-Civ-CA

C. CAREY MATTHEWS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER DENYING MOTION TO VACATE SENTENCE

[Filed Oct. 13, 1976]

THIS CAUSE came before the Court on plaintiff's motion to vacate sentence. The motion is denied.

On September 2, 1976, this Court conducted an evidentiary hearing directed to the issue of whether the government induced plaintiff's guilty plea by means of threat vel non. Because plaintiff alleged that the threat was made by the government attorney to plaintiff's attorney over the telephone, the testimony of those persons is the relevant testimony before the Court. The subjective thoughts of plaintiff and his partner are not material to the issue.

After careful analysis of the testimony adduced at the hearing, and after consideration of the memoranda

submitted by both parties, it is the finding of this Court that although the attorney for the government may have speculated to plaintiff's attorney that his client would receive a lengthy sentence if convicted, there was no threat conveyed. Accordingly, it is

ORDERED AND ADJUDGED that the motion to vacate sentence is denied.

ENTERED at Miami, Florida this 13th day of October, 1976.

/s/ C. Clyde Atkins
United States District Judge

cc.
U.S. Attorney
Leo Greenfield, Esq.

APPENDIX "D"

C. Carey MATTHEWS,
Petitioner-Appellant,

v.

UNITED STATES of America,
Respondent-Appellee.

No. 76-4244.

United States Court of Appeals,
Fifth Circuit.

March 20, 1978.

Motion was filed to vacate and set aside guilty plea on ground that it was coerced by alleged threat that defendant would receive a lengthy sentence if convicted. On remand, 533 F.2d 900, the United States District Court for the Southern District of Florida, C. Clyde Atkins, J., found that no threat had been made, and movant appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) finding was not clearly erroneous, and (2) defendant's subjective belief alone was not sufficient to invalidate the plea.

Affirmed.

1. Criminal Law — 1158(1)

In a proceeding to vacate and set aside a guilty plea the district court's finding of fact are to be upheld unless clearly erroneous. 28 U.S.C.A. §2255.

2. Criminal Law — 1158(1)

Finding that although prosecutor may have speculated to defense counsel that defendant would receive a lengthy sentence if convicted there was no threat conveyed inducing defendant to plead guilty was not clearly erroneous. 28 U.S.C.A. §2255.

3. Criminal Law — 273(1)

A defendant's subjective belief that he will receive a lengthy sentence if he goes to trial is not alone sufficient to invalidate a guilty plea. U.S.C.A. §2255; Fed.Rules Civ.Proc. rule 11, 18 U.S.C.A.

4. Criminal Law — 1181

Although more detailed findings on motion to vacate and set aside guilty plea might have been helpful, remand therefore was not required absent showing of prejudice. 28 U.S.C.A. §2255.

Appeal from the United States District Court for the Southern District of Florida.

Before JONES, RONEY and TJOFLAT, Circuit Judges.

RONEY, Circuit Judge:

This case initially came to this Court for determination of whether C. Carey Matthews was entitled to an evidentiary hearing on his §2255 claim that threats or coercion induced his guilty plea. Holding that an evidentiary hearing was required, we remanded the case

to the district court. *Matthews v. United States,* 533 F.2d 900 (5th Cir. 1976). This present appeal questions the district judge's finding, on remand, that no threat had been made. We affirm.

Matthews, a former member of the Florida legislature and former practicing attorney, charged with securities, mail and wire fraud, plead guilty to one count of a nineteen count indictment, at the same time asserting his innocence, a procedure specifically authorized by the Supreme Court's decision in *Alford v. North Carolina,* 400 U.S. 25, 92 S.Ct. 160, 27 L.Ed.2d 162 (1970). In return, the Government agreed to dismiss the other counts of the indictment and recommend five years probation, which Matthews received.

Matthews later brought the instant motion to vacate under 28 U.S.C.A. §2255, claiming his guilty plea had been coerced. He alleged the prosecutor had told his counsel that the trial judge said he would sentence Matthews to at least ten years imprisonment if Matthews went to trial and was found guilty. Matthews alleged that it was only after this threat that he decided to plead guilty.

We held that an evidentiary hearing was required to determine the truth of Matthews' assertions, because of conflicting affidavits of Sonnett, the prosecutor; Block and Mandina, Matthews' attorneys; and Matthews. At the evidentiary hearing, a district judge other than the trial judge who took the plea received testimony from these affiants.

The former prosecutor, Neal Sonnett, testified that at Block's request he had gone to see the trial judge to

determine whether or not the judge would accept an *Alford* plea. This short discussion with the judge was limited to that question. When the judge indicated he would accept the *Alford* plea, Sonnett reported that fact to Block, who had waited outside the judge's chambers. Sonnett denied that he had conveyed to Block any opinion about what the judge would do if the case went to trial. Sonnett did testify, "out of a sense of fairness to Mr. Block," that he could "understand the circumstances under which Mr. Block might have gotten this impression [that Sonnett knew something about what the judge intended]." But he immediately followed this by again categorically denying that he had ever indicated to Block the things that Matthews alleged.

Irwin Block, Matthews' former defense attorney, was the second witness. He testified that what he had said in his affidavit was true, "as far as it goes," but that it needed "elaboration" and Matthews' present counsel had "read something into it that is not contained there [since] nowhere [in his affidavit] was there any indication of any threats." Block said that during negotiations prior to trial, he and Sonnett had discussed what would happen if Matthews was convicted: Block thought Matthews would get either probation or a short prison sentence, and Sonnett thought that Matthews would get a long prison sentence. When Sonnett talked to him after leaving the judge's chambers, Block testified that "Somehow or other, I got the impression that there was some indication, no threats, no statements, but some indication from whatever was said, that the judge felt about this case the way that Neal [Sonnett] had indicated to me," i. e., that if convicted Matthews might get a long term of imprisonment. Block characterized

the impressions he had gotten from Sonnett as mere "laywer talk." He "at no time took it as a threat and [he] at no time conveyed it as a threat." Block said he had told Matthews that he was not even sure whether the judge had said anything, but he felt obliged to convey it to him.

Philip Mandina, Matthews' former law partner, was the next witness. He testified that he was with Matthews when Block called, and that he had participated in Block's call. He summarized the call by testifying that Block said specifically that he had a discussion with Sonnett and Sonnett had talked to the judge, who had indicated to him that if Matthews was found guilty on any one count he would give him at least ten years in jail. Mandina testified that he thought the call was "threatening in nature," but, significantly, he also said that Block had told Matthews that he did not think the judge had made the statement. Mandina said that he had not believed that the judge had made the statement either. He and Matthews discussed the situation, and Matthews decided that he could not take the chance, so he decided to plead guilty.

Matthews then testified in his own behalf. He said that he had been prepared to go to trial until he had received the call from Block. According to Matthews, Block said the judge had "threatened" a ten-year sentence, and this had not been an impression on Block's part but unequivocally what Sonnett had told him the judge had said. Matthews testified that while Block had told him Sonnett was politically ambitious and might be lying, Matthews believed the threat, because he could not afford to take a chance of not believing it and receiving ten years imprisonment. He also explained that he

had not mentioned the threat when questioned by the trial judge during the Rule 11 guilty plea hearing, at sentencing or when he had previously petitioned to terminate probation, because he believed the judge was "hostile" and would refuse to accept the plea and possibly give him an even harsher sentence if he spoke up. Matthews said he had finally brought the §2255 petition because he had become convinced by a newspaper article suggesting that Sonnett wanted a conviction in his case for political reasons, and by the judge's fair and compassionate attitude at the probation termination hearing, that the judge had not made the threat which Sonnett had conveyed to Block.

After hearing all of this testimony, the district judge found "that although the attorney for the Government may have speculated to plaintiff's attorney that his client would receive a lengthy sentence if convicted, there was no threat conveyed." He denied relief.

[1] In a §2255 case, the district court's findings of fact are to be upheld unless they are clearly erroneous. *United States v. Strother,* 458 F.2d 424 (5th Cir.), *cert. denied,* 409 U.S. 1011, 93 S.Ct. 456, 34 L.Ed. 2d 305 (1972).

[2] Matthews places great reliance on the contents of Block's and Mandina's affidavits instead of the testimony at the evidentiary hearing. We remanded this case for an evidentiary hearing precisely because the affidavits were contradictory. At that hearing, Mandina testified substantially in accordance with his affidavit, but added that neither he nor Block viewed Sonnett's statement as a threat by the judge. Block stated that his affidavit was correct as far as it went, but that it needed

elaboration, and that he had viewed Sonnett's remark not as a threat but just as "lawyer talk." Sonnett continued to categorically deny that he had ever passed along a threat. Based on a careful review of the transcript of this testimony at the evidentiary hearing, the district court's finding is not clearly erroneous.

[3] Matthews contends that the district court erred in refusing to consider his subjective belief that a treat had been made. The law of this Circuit, however, holds that the defendant's subjective belief alone is not sufficient to invalidate a guilty plea. *See, e. g., United States v. McIntosh,* 566 F.2d 949 at 951 (5th Cir. 1978); *United States v. Maggio,* 514 F.2d 80, 88 (5th Cir.), *cert. denied,* 423 U.S. 1032, 96 S.Ct. 563, 46 L.Ed.2d 405 (1975); *United States v. Battle,* 467 F.2d 569 (5th Cir. 1972).

The First Circuit's recent decision in *McAleney v. United States,* 539 F.2d 282 (1st Cir. 1976), cited by appellant, is not to the contrary. In *McAleney,* the prosecutor ventured his personal estimate that McAleney might receive three to five years in prison. At the evidentiary hearing, the trial court found that McAleney's counsel translated the prosecutor's opinion into a Government promise to recommend such a sentence. The First Circuit held that McAleney was entitled to rely on his counsel's erroneous representation of such an agreement. But the court also noted that without his counsel's erroneous transmission of the alleged Government promise, McAleney's subjective belief would be immaterial. 539 F.2d at 284.

If Block had transmitted a Government threat to Matthews, then *McAleney* would be relevant. We need

not decide here whether we would adopt the First Circuit's position where a defendant's own attorney transmits a non-existent Government promise to his client, for we are not now faced with such a situation. The clear implication from the district court's finding is that Sonnett did not convey a threat to Block, nor did Block transmit such a threat to Matthews. Since no threat was transmitted to Matthews by the Government or by his own counsel, his subjective belief is not material. *McAleney, supra; Maggio, supra.*

[4] Finally, Matthews contends we must again remand the case because the district court did not sufficiently set forth findings of fact and conclusions of law as required by §2255. Although they might have been helpful, Matthews has not been prejudiced by the absence of more detailed findings. *See Papalia v. United States,* 333 F.2d 620 (2d Cir.), *cert. denied,* 379 U.S. 838, 85 S.Ct. 74, 13 L.Ed.2d 45 (1964).

AFFIRMED.

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 71-606-CR-PF

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

C. CAREY MATTHEWS,
Defendant.

AFFIDAVIT

STATE OF FLORIDA)
)SS
COUNTY OF DADE)

BEFORE ME, the undersigned authority, personally appeared PHILIP J. MANDINA, who, after being first duly cautioned and sworn, deposes and says:

I am an attorney, a member of the Florida Bar, with offices located at 1710 South Bayshore Drive, Miami, Florida.

That during the approximate period 1965 through January 1972, I was a member of a law partnership with C. Carey Matthews.

On or about October 13, 1971, Mr. Matthews was indicted, along with three other parties, in a case filed in

the District Court of the United States for the Southern District of Florida, Case No. 71-606, CR-PF, charging him and the other parties with certain violations of the Securities and Exchange Acts of 1933 and 1934.

The aforesaid charges arose out of Mr. Matthews accepting a commitment in January 1968 to serve as general counsel of the State Fire and Casualty Company, Miami, Florida. Said company was in financial straits which eventually resulted in its liquidation by the Florida Insurance Department.

During this period of time, our firm also served as defense counsel, defending various liquidated suits involving the assureds of State Fire.

At the request of the President of the company, we also moved our law offices and subleased space in a building leased to State Fire and Casualty Company, however, our firm maintained separate offices in that building.

As defense counsel to represent him in the aforesaid trial, Mr. Matthews retained Irwin Block, Esquire, distinguished member of the Florida Bar with offices in Miami, and subsequent president of the Dade County Bar Association.

The indictment in question basically accused the Defendants of conspiring to violate the Securities and Exchange Acts aforementioned, and the Rules and Regulations of the Securities Exchange Commission in various ways designed to defraud the company and its assets.

Mr. Matthews served as general counsel and as an officer and director for a period of seven months, resigning on July 23, 1968. The company continued its business until April of 1969 when it was placed in liquidation. During the approximate seven months of Mr. Matthews connection with State Fire, he was absent for the best part of January and June in two separate special sessions of the Florida Legislature of which he was a member. He did not have an office with State Fire but his office was located with our law firm, and I know of my own knowledge that he conspired with no one to defraud State Fire, or to violate the laws and regulations pertaining to the Securities and Exchange Commission.

The trial in the Southern District of Florida was scheduled to come before Judge Peter Fay on or about January 10, 1972. Several days before the trial date, Mr. Matthews and I were in our law office discussing the forthcoming trial and going over the exhibits in readiness for said trial. All of the other defendants had plead guilty to certain counts of the indictment after plea bargaining and had received favorable treatment from the United States Attorney in connection with the pleas. It was clear to us that certain defendants, in particular Benjamin Dobson, the President of State Fire, were not willing to discuss the case and their testimony with our counsel, Mr. Block, or with us, although up until a few days before trial, Dobson had stated that he was prepared to testify to the truth that Mr. Matthews was not involved in any way with any conspiracy in connection with State Fire.

Suddenly, Dobson refused to return our phone calls and Mr. Block, Mr. Matthews' attorney, called this to

the attention of the court by motion for continuance. This motion was denied.

On the day in question, which I believe was January 7, 1972, as Mr. Matthews and I were discussing the case in our law office, we received a call from Irwin Block, Mr. Matthews' counsel. Mr. Block requested that both of us get on the phone on different extensions as he had important information to convey.

Mr. Block stated to Mr. Matthews and to me that he had just come from a discussion with Mr. Neal Sonnett, the Chief of the Crimes Division, United States Attorney's Office in Miami, concerning Mr. Matthews' entering a plea of guilty to at least one count of the 19 count indictment. Several such discussions had been held at prior times during the week by Mr. Block and Mr. Sonnett, but Mr. Matthews had told me and we agreed that he was going to go to trial on the case no matter what the other defendants did or what pressures were brought upon them to bring false testimony against him.

Mr. Matthews with me on the telephone on these prior occasions when Mr. Block had reported the discussions with Mr. Sonnett to us, had indicated to Mr. Block that he was ready to go to trial and wanted a trial despite whatever pressures the government could bring on the witnesses.

In this final telephone conversation, which I believe was on January 7th, Mr. Block was considerably upset and related to us that Mr. Sonnett had just advised him that he had just left the office of Judge Peter Fay, the trial judge, who had discussed with him the forthcoming

trial date and the fact that Mr. Matthews was to be the only defendant. Sonnett related that the Judge was upset about the possibilities of a trial lasting several months and that the Judge had conveyed to him that the message should be made known to Mr. Matthews and his counsel that in the event of conviction of one of the counts of the 19 count information, he would impose upon Mr. Matthews a ten-year sentence to the Federal Penitentiary. Block, myself and Mr. Matthews were stunned at this statement.

Matthews said to me, "This is hard to believe, but I can't believe that the Chief of the Crimes Division would risk deliberately lying about a threat like this from the judge. I have to believe it's true."

After further discussion, Mr. Matthews said to me, "This is a terrible threat to put on a man with three children, a one-year old, three-year old and four-year old. What would ever become of them? I can't afford to take a chance on a conviction and a ten-year sentence, especially with a threat like this. For my family's sake, I really have no alternative."

Mr. Matthews then agreed to meet with Irwin Block to enter a plea of guilty to a single count of the indictment pending against him, Count 14.

As to Count 14 of the indictment; it pertained to a violation of certain regulations of the Securities and Exchange Commission and Act in causing to be mailed certain proxy statements containing misleading information or omitting to state information which should have been placed in the proxy statements.

Actually, I know as a matter of fact that the proxy statement in question was not prepared by Mr. Matthews, it was prepared by Norman Leibling, a Chicago, Illinois attorney and outgoing general counsel of State Fire. Neither Mr. Matthews nor our office participated in any way in the distribution or disseminating of the proxy statement, which was done by State Fire and Casualty Company itself.

I know of my own personal knowledge from the discussions with Mr. Block on January 7th, as hereinabove related, and thereafter with Mr. Matthews, that Mr. Matthews would never have entered a plea of guilty of any count of the indictment, as he was innocent of all counts thereof, and only did so on the alleged direct threat relayed by Assistant United States Attorney Neal Sonnett to Irwin Block, Mr. Matthews' attorney, and thus to Mr. Matthews, that a ten-year sentence awaited him if convicted. For family reasons as above stated, he sacrificed his political and legal future. An injustice has been done here and should be righted.

FURTHER AFFIANT SAYETH NOT.

/s/ Philip J. Mandina
Philip J. Mandina

SWORN to and SUBSCRIBED before me
this 10 day of June, 1975.

/s/ Donna B. Wallace
NOTARY PUBLIC, State of Florida at Large
My Commission expires: Feb. 10, 1976

APPENDIX "F"

STATE OF FLORIDA
COUNTY OF DADE

Before me, the undersigned authority, personally appeared IRWIN J. BLOCK, who, being by me first duly sworn, did depose and say:

1. In 1971 and in January of 1972, he was representing Carey Matthews in connection with a case pending in the United States District Court before the Honorable Peter T. Fay, United States District Judge, involving Carey Matthews and other defendants.

2. On the eve of trial, the undersigned was contacted by Neal Sonnett, Assistant United States Attorney, and to the best of undersigned's knowledge, advised that the Court had indicated to him, Mr. Sonnett, that if Carey Matthews went to trial and was found guilty, he would be sentenced to a substantial term of years, the exact number of which Affiant does not remember today, but which he believes to be in excess of ten years.

3. Your Affiant immediately conveyed this information to Carey Matthews who, thereafter decided to plead guilty, rather than take the chance of being sentenced to the time indicated by the Assistant United States Attorney.

Further, Affiant saith not.

/s/ Irwin J. Block
IRWIN J. BLOCK

Sworn to and subscribed before me
this 11th day of June, 1975.

(Signature Illegible)
Notary Public State of Florida at Large
My commission expires Mar. 9, 1977

APPENDIX "G"

WALL STREET JOURNAL
APRIL 24, 1974

Under the Gun

As Feds Closed In,
Promoter Closed Deal
With Top Nixon Aide

Mort Zimmerman Bought
LaRue Family Business,
Put LaRues on Payroll

Did Prosecutors Go Easy?

By JONATHAN KWITNY
Staff Reporter of
The Wall Street Journal

From 1969 to 1972, S. Mort Zimmerman of Dallas, Texas, may have been the nation's most investigated businessman.

He or some of his corporate enterprises were indicted, enjoined, delisted, suspended or fined by courts, enforcement agencies and a stock exchange. But in January 1972, he struck a bargain with the Justice Department and pleaded guilty to a few of the criminal charges against him.

To the consternation of agents from the Securities and Exchange Commission, the Federal Bureau of Investigation, the Comptroller of the Currency's office, the

Postal Service and various state agencies, Mr. Zimmerman never went to prison. Now, a few investigators are beginning to think that somebody pulled strings on Mr. Zimmerman's behalf.

Their evidence — based on matching old SEC files with developments in the Watergate scandal — is only circumstantial. And one SEC man thinks that Mr. Zimmerman may have got off merely because a federal prosecutor was willing to deal with Mr. Zimmerman in return for evidence that would convict another man and better enhance the prosecutor's political ambitions. Mr. Zimmerman himself says he avoided jail fair and square, largely because his violations were only technical.

Still, the evidence solidly links Mr. Zimmerman in a multimillion-dollar deal with Fred C. LaRue and members of his family.

On Mr. Zimmerman's Payroll

Mr. LaRue, as a top aide to Nixon campaign chief John Mitchell, his chief political mentor since 1968, performed duties that included such delicate chores as helping to destroy incriminating evidence and to deliver "hush money" to Watergate burglars, for which he pleaded guilty to conspiracy to obstruct justice. Earlier, as a high-level consultant to President Nixon, Mr. LaRue was unsalaried. But he by no means went uncompensated. While he worked for the President, and while investigators from many agencies were closing in on Mr. Zimmerman, Mr. LaRue, his brother and his brother-in-law were drawing $100,000 a year from a company controlled by Mr. Zimmerman. The LaRue

group had a large stock interest in the company. And Mr. Zimmerman, through stock purchases and a big bank loan, funneled them additional chunks of cash.

The LaRue group got into this position through the sale of its debt-ridden family concern. Larco Drilling Corp. to Mr. Zimmerman's Capital General Corp. (then Capital Bancshares Inc.) in April 1968. The investigations of Mr. Zimmerman had been intensifying for nearly a year by that time. Larco, a Gulf Coast oil and gas firm, had been founded by Fred LaRue's father, I. P. LaRue, Sr., who was accidentally shot to death by Fred LaRue in a hunting mishap. By 1969 Larco was owned by Fred LaRue; his brother, I. P. (Ike) LaRue Jr., and Fred LaRue's brother-in-law, Harry Owen.

At the time they sold it to Capital General, Larco's assets were valued at $3,700,493 (including a $390,000 loan to Messrs. LaRue and Owen), its liabilities at $3,753,335. Mr. LaRue says the deficit may have resulted from valuing the assets (mainly drilling equipment and some oil property) at cost rather than market value, though he says that he isn't sure now. In any case, Mr. Zimmerman's Capital General gave the LaRue family 22,085 shares of Capital General, worth nearly $2 million based on their $9-a-share bid price in the over-the-counter market, in return for Larco.

A $750,000 Loan: Easy Terms

But in a complex fashion characteristic of many of his business deals, Mr. Zimmerman sweetened the pot considerably for the LaRue family. He arranged with his banker, Roger B. Mize, to let Mr. LaRue and his relatives borrow $750,000 from a Texas bank of which

Mr. Mize was chairman. A Capital General subsidiary bought $350,000 in certificates of deposit from two other banks with which Mr. Mize was associated to induce the loan. Collateral of 82,500 shares of Capital General was put up, presumably by the LaRue family, though records and memories now are unclear on the subject. Still, Capital General was committed to repay the loan if the LaRue family didn't.

Of the $750,000 the LaRue family members were permitted to borrow they used $390,000 to repay the money Messrs. LaRue and Owen had borrowed from Larco. They lent Larco another $200,000. They kept the remaining $160,000, Mr. LaRue says.

Finally, Capital General agreed to employ Mr. LaRue and his relatives for a total of $100,000 a year, to be divided as they chose, and to insure them stock options, which never were exercised because the price on Capital General stock fell. Mr. LaRue became president of Capital General's new Larco subsidiary.

Troubles, but a Pay Raise

The deal looked good at first. Then it soured. By March 1970, the price on Capital General stock had fallen to $3 or $3.50 a share. The LaRues' Capital General shares, once worth about $2 million, then were worth no more than $677,000, although their bank loan had been reduced $200,000 by installments paid by Capital General under the original agreement.

Despite his own troubles, Mr. Zimmerman stepped in and had Capital General offer to buy back for $750,000, or $12.50 a share, the 62,500 Capital General

shares still held by the bank as collateral for the LaRues' loan. This offer, had it been carried out, would have more than repaid the LaRues' remaining debt. While the LaRues considered this offer, Capital General also offered to upgrade the dwindling value of the LaRues' loan collateral by adding stock in Capital General subsidiaries. And Capital General offered to raise to $160,000 a year from $100,000 the compensation to the LaRues.

Throughout this 1969-70 period, Mr. Zimmerman was in trouble. The same month he made the Larco deal, State Fire & Casualty Co., a Miami-based insurer that had been a subsidiary of Capital General until 10 months earlier, went bankrupt. It folded after a complicated deal involving Mr. Zimmerman and Edward Wuensche, who had been convicted of fencing stolen stock and who had detailed his Mafia ties in congressional testimony. The deal resulted in State Fire's valuable assets being replaced by worthless securities. During the 18 months Mr. Zimmerman controlled State Fire, he transferred $1.5 million of its liquid assets to Capital General in exchange for stock in a Capital General subsidiary. He took back this stock when he sold State Fire and arranged for Wuensche to replace it with securities that turned out to be worthless. Besides setting the stage for State Fire's bankruptcy, this brought the investigators down on Mr. Zimmerman.

He faced other setbacks. The Comptroller's office was pressuring him to yield control of a chain of banks that Capital General owned. Their questionable loans allegedly had created big losses. Mr. Zimmerman had contracted to sell his flagship bank, Capital National of Miami. But the Comptroller's office was unhappy

because the chosen buyer was a Netherlands Antilles-based mutual fund run by Allen Lefferdink, a controversial offshore-fund promoter whose Colorado financial empire had been brought down already by the SEC.

In April 1969, the same month he made the Larco deal, Mr. Zimmerman's Capital General sold control of its Underwriters Trust Co., New York. Later, in testimony at a congressional hearing, it was disclosed that under Mr. Zimmerman's control, Underwriters Trust had accepted as loan collateral more than $1 million in stolen securities.

And also about the time of the Larco deal, the insurance departments of Florida and Arkansas, along with the U.S. Postal Service, were contemplating action against Mr. Zimmerman over the bankruptcy of North American Guaranty Insurance Co., Little Rock. Some 16,000 policyholders had been stripped of their protection when North American's assets evaporated during a stock swap involving Capital General.

The American Stock Exchange and the SEC were keeping a close eye on Mr. Zimmerman's Intercontinental Industries conglomerate because of the involvement of a prominent Mafia figure, Michael "Big Mike" Polizzi. Later, in the summer of 1969, the Amex and the SEC accused Intercontinental of issuing false publicity releases. Mr. Zimmerman consented to a civil-court injunction against fraud. Trading in the stock was suspended in June 1969. The Justice Department, which handles criminal prosecutions for federal investigative agencies, was beginning a probe into Mr. Zimmerman's affairs.

White House Pass

Throughout this period — the spring and summer of 1969 — and, in fact, up until early egory of special projects." A wealthy Mississippian and longtime Republican leader, Mr. LaRue had contributed early to Mr. Nixon's 1968 campaign and become a top aide to John Mitchell, who ran the campaign. After the 1968 election, Mr. LaRue went to work directly for the President, and Mr. Mitchell, of course, became Attorney General.

Though Mr. LaRue wasn't a full-time employe of the President's, he had a White House pass, and he was supposed to be available at all times for assignment. According to a White House spokesman, the only comparable post under Mr. Nixon was that held by former Treasury Secretary John Connally when he returned to Washington last year to assist the President. But Mr. Connally, unlike Mr. LaRue, was barred from outside work while he served as special consultant.

(Early in 1972, Mr. LaRue left the White House to work under Mr. Mitchell again in the Nixon campaign. This work led him into the Watergate cover-up. He pleaded guilty on June 27, 1973, to conspiracy to obstruct justice. Sentencing has been delayed until he completes his testimony against other defendants.)

Mr. Zimmerman's connection with a top Nixon strategist, whatever other value it may have had, did little to stop the downhill side of his business ventures. And Capital General's stock plummeted. On Sept. 15, 1970, a year and a half after the Larco deal, it hit $1.75 bid. On that date the LaRues ended their employment

agreement with $180,000 having been paid. But Larco, still a Capital General subsidiary, bought back from them 18,634 shares of Capital General stock at $6 a share, for a total of $111,804, to cover debts the LaRues had incurred, and Larco agreed to buy back from the family another 105,000 shares at $6 in installments. Also, the LaRue group was released from all liability for the $750,000 bank loan. Capital General stock continued to fall in the open market, hitting $1 bid on Nov. 19.

"Washington Pulled the String"

Mr. Zimmerman's legal troubles were coming to a head, too. On April 30, 1971, he and four associates were indicted by a federal grand jury in Miami on 19 counts of mail and securities fraud involving Capital General's looting of State Fire. In December 1971 the grand jury added a charge that Mr. Zimmerman attempted to bribe an assistant U.S. attorney with $40,000 to win dismissal of the first indictment.

A month later, investigators were shocked to learn that Mr. Zimmerman had negotiated a high-level Justice Department deal. He was allowed to plead guilty to four counts, for which he was fined $30,000, put on probation and given immunity from all other charges. The deal took place in January 1972, when Messrs. Mitchell and LaRue were preparing to move from the Justice Department and the White House, respectively, to the Committee to Re-Elect the President. The arrangement was made by Assistant U.S. Attorney Neil Sonnett in Miami, but it was overseen by Robert Hickey, supervisor of the criminal fraud section of the Justice Department in Washington.

Mr. Hickey flew to Miami for the negotiations. He and Mr. Sonnett agreed to let Mr. Zimmerman plead guilty to the handful of charges in return for a light sentence and dismissal of the other charges.

"Somebody in Washington pulled the string on us," says Kathryn Gregory, a lawyer who recently retired as an official of the Florida Insurance Department. "I think it had to be through LaRue. We spent years working on that case," Irving Bober, another attorney for the department, also cites the LaRue connection as a factor in Mr. Zimmerman's probation. "It was a Washington deal," he says. "My best judgment is that everybody knew what was going on down here (in Florida)." he says.

Was Society Cheated?

In Washington, the Justice Department declines to comment, but some individuals involved dispute any suggestion that Mr. LaRue influenced the settlement. Mr. Sonnett, now a Miami attorney, says he had to persuade the Justice Department to agree to it. He says he considered it simply on its merits.

David Ross, an SEC attorney, protested the settlement. But he says he thinks the LaRue connection had nothing to do with it. He says it came about because Mr. Zimmerman had promised to testify against a co-defendant, Carey Matthews, a prominent Florida legislator, against whom evidence was weak. He says that Mr. Sonnett, the assistant U.S. attorney in Miami, was more interested in convicting a local politician — Mr. Matthews — because Mr. Sonnett was about to quit his job to run for state office and the Matthews' convic-

tion would be a feather in his cap. Mr. Sonnett did quit to seek the Democratic nomination for state attorney in Dade County — and lost; he says the handling of the Zimmerman case had nothing to do with his political aims. And Mr. Ross says higher officials in the Justice Department, rather than wanting to let Mr. Zimmerman get off, had preferred a two-year jail sentence.

But the federal judge in the case, Peter Fay, was uneasy about the settlement. "I was very upset about the plea bargaining procedure because it made the court into a rubber stamp," he says. If the defendants were guilty of all the charges, he said at the time, "our judicial system and society have been cheated." Judge Fay says he went along with the agreement made by the prosecutors because Mr. Zimmerman and his codefendants had exposed themselves by offering evidence and otherwise living up to their end of the deal. He says he didn't learn about the LaRue connection until long afterward.

Mr. Zimmerman is coy about the LaRue connection. "He knew I had problems with the government," he says of Mr. LaRue. "He knew they were fishing around my office for everything they could find. I always told him I am a man who likes to meet with people, anybody in government. I never had the opportunity. I think he might have discussed it with people he knows, but I never talked (to them)."

The LaRues Get Out

Mr. LaRue doesn't exactly remember it that way. "I don't recall him ever bringing the subject up," Mr.

LaRue says, "and I wouldn't have (interceded) anyway."

(However, a former FBI agent, William F. Higgins Jr., says he suspects that the Larco deal may have influenced orders he got to stop investigating a Cleveland businessman with close ties to Mr. Zimmerman. The agent was fired from the FBI after he kept probing for fraud in several large bankruptcies involving the businessman. The Justice Department says Mr. Higgins SEC civil fraud injunctions in the case, and he is suing for reinstatement.)

Mr. Zimmerman pleaded guilty in January 1972. In the same month, Capital General sold all the non-cash assets of Larco to Transcontinental Oil Corp., a New Orleans-based firm, for 225,000 shares of Transcontinental stock, then worth about $540,000, and $2.5 million in notes. The shares since have risen to about $1.2 million, but most of the stock and notes went into an escrow account to pay off Larco creditors, says R.A. Oxenreiter, vice president of Transcontinental Oil. "When we bought (Larco), it was for all practical purposes bankrupt," he says.

A few months later, on April 12, 1972, Capital General turned over to Mr. LaRue and his relatives 25,000 shares of Transcontinental Oil. The family, in turn, agreed to return 6,000 shares of their remaining holding in Capital General, releasing them from all remaining debts and obligations under the original deal. By that time, the $750,000 loan to the family by Mr. Mize's bank had been paid down to $433,215.64 by Capital General. Mr. Zimmerman says he doesn't know exactly how the loan stands now.

APPENDIX "H"

Sonnett-Cross

THE WITNESS: If I may say, Judge, since this controversy concerning the two affidavits of Mr. Block and myself has come up, I want to clearly state that Mr. Block and I have had several conversations since that controversy.

I think that we have a fairly decent recollection of this case at this point as to what took place, although neither one of us remember the words. I think that in fairness to Mr. Block that I ought to say that I can understand the circumstances under which Mr. Block might have gotten this impression from anything I said. But I think that it should clearly say at no time did I ever indicate to Mr. Block the things that have been set out in the affidavits filed by Mr. Mendina and Mr. Matthews.

REDIRECT EXAMINATION

BY MR. GREENFIELD:

Q What did you say that may have given Mr. Block the impression that he indicated in his affidavit?

A The only thing that I can think of is the statements that I recall that I may have made and probably made on several occasions to all of the defendants that the Court looked dimly on these kind of crimes. But there is a far cry between that and saying what appears in Mr. Mendina's affidavit; for example, that Judge Fay asked me to pass on a message to the defendant. That is

absurd. And I clearly deny that. And I deny that I ever in any way tried to insinuate to Mr. Block or anybody else that might have happened.

I respect Mr. Block a great deal and I think that he is an outstanding lawyer and had a great deal of integrity. And I am sure that the wording of Mr. Blocks affidavit, although he never says that I said that in his affidavit, but the wording that he believed that the Court had indicated to me, may have been caused by a misimpression as to what I said.

Q Well, let me read you exactly what he said in his affidavit. "On the eve of trial the undersigned's was contacted by Neal Sonnett, Assistant United States Attorney, and to the best of the undersigned's knowledge advised that the Court had indicated to him, Mr. Sonnett, that if Carey Matthews went to trial and was found guilty he would be sentenced to do a substantial term of years, the number of which, the affiant does not remember today, but which he . . . . that I knew something from the Judge. But I did tell him what I thought I would recommend, what I thought that Mr. Matthews would get, as I do with all defendants.

Q Well, Mr. Sonnett, you know Mr. Block to be experienced and a long time criminal lawyer, don't you?

A Yes, sir, I do.

Q And at the time of this trial he was or at the time of your conversation he was a seasoned, experienced criminal lawyer?

A He was, yes, sir.

Q Now, you would not expect Mr. Block to relate or misunderstand any implication that you made by him having said the Court had indicated that thinking, that that indication that just came from your memory, would you?

A I think that that question is better put to Mr. Block. I can tell you that my respect for Mr. Block leads me to the firm conclusion that had a prosecutor said anything like that to him and indicated that the Judge had passed along such a message, that Mr. Block would have gone right to the Judge and at least confronted that Court with it, and if that were . . . .

Q I understood from your previous testimony, or your questions on direct examination, that you said that Mr. Block said that he didn't think Judge Fay had made the statement.

A I didn't believe it, either.

MR. BATES: You may inquire.

REDIRECT EXAMINATION

BY MR. GREENFIELD

Q Immediately after that information you had a discussion with Mr. Matthews, didn't you?

A Yes, sir.

Q And immediately after that discussion Mr. Matthews decided that he would plead guilty, and he went to see Mr. Block; is that right?

Q Mr. Mandina, I show you an affidavit and the signature on that affidavit which is dated the 10th of June, 1975 and I ask you if that is your signature?

. . . . some manner there had been some indication to Neal that there would be a substantial number of years in the event that he was found guilty.

Q Now, this impression that you had disturbed you, didn't it?

A I don't know what you mean by "disturbed me."

Q You went right to the telephone and you called up Mr. Matthews?

A Yes. As I do when I hear anything of that nature from any prosecutor.

Q And you conveyed to Mr. Matthews in that telephone conversation that impression, didn't you?

A What impression? The impression that I got from Mr. Sonnett?

Q The impression that you had gotten from Mr. Sonnett that the Court had indicated that in the event of a finding of guilty, a long prison term would follow.

A I did convey that and I also told Carey at that time, if I can remember, that I don't know if the Court had said it or whether this was Neal talking or whatever it is, but I wanted him to . . . .

A He wanted to plead guilty, then under those circumstances that was a pretty good deal.

Q And you would not have taken any steps before Judge Fay to upset that deal, would you?

A No, sir.

Q Did you have any further discussions before your appearance before Judge Fay with Mr. Sonnett about that impression that you had gotten from him as to the indication from Judge Fay?

A Not that I can recall.

Q So then as a matter of fact, even after refreshing your recollection as to your testimony and your cross examination, I would like to ask you now, I want to read this statement to you again and ask you that in light of everything now, if it is still a true statement: "On the eve of trial the undersigned was contacted by Neal Sonnett, Assistant United States Attorney, and to the best of the undersigned's knowledge, advised that the Court had indicated to him, Mr. Sonnett, that if Carey Matthews was tried and was found guilty, he would be sentenced to a substantial term of years, the exact number of which affiant does not remember today, but which he believes to be in excess of ten years."

A That is the same thing that I have been telling you I think for the last hour or thirty minutes, how ever long we have been here. That is true and it required the elaboration that you or Mr. Gates have brought out.

BY MR. GREENFIELD:

Q Now, Mr. Mandina, did you and Mr. Matthews have several calls and discussions with Mr. Block on that date?

A I only remember the one.

Q Well, would you please tell us what your recollection is as to that conversation?

A Well, Mr. Block called and indicated that he had had a discussion with Mr. Sonnett and that Mr. Sonnett had indicated to him that Judge Fay had indicated to Mr. Sonnett that if Mr. Matthews was convicted on any one count he would get at least, I believe, ten years in prison. And in view of the fact — that fact — what did Mr. Matthews want to do. And he felt that that was important that he knew that occurred.

Q And did Mr. Block indicate that there was any question in his mind that the information that he was conveying on to Mr. Matthews was information which in reference to an indication or a statement made by Judge Fay was passed on through Neal Sonnett?

A Well, I don't think that he could evaluate whether Judge Fay had made the statement. We all obviously believe that Judge Fay did made the statement. The question then became, had he, or how did he find out, or whatever. And we asked Mr. Block that. "What did you think?" And he said, "Well, I don't think he made the statement, but I don't know." And I believe that was the tenor of the conversation. He did not know whether Judge Fay had made the statement or not.

Q But he indicated that Sonnett had told him that the statement had been made or an indication had been made?

A That is what he said. He said the Judge told that to Mr. Sonnett.

MR. GREENFIELD: I have no further questions, Your Honor.

. . . . in the form of a threat that the judge wanted to convey to the defendant somehow?

A I don't know whether to say I felt that it was a threat, because I don't know what sentence you could get for what was in the indictment.

In other words, it may be ten years, it may be that Judge Fay thought that was a light sentence. I did not feel that way. I thought that it was threatening in nature. Mr. Block conveyed that to me. I mean, that was the purpose of the call.

Q But you had a discussion, as I understand from what you said before, that Mr. Block said he could not evaluate whether Judge Fay had made the statement, but he did not think he had made it.

A No. I said that Mr. Block could not have evaluated it. I assume he evaluated it for himself.

Q But I understood from your previous testimony here that you said that Mr. Block said that he didn't think Judge Fay had made this statement.

A I believe he did indicate that when I asked him. I said, "Well, Irwin, what do you think about all that?" and he said, "Well, I don't think that he made the statement; but I don't have any way. . . .

THE WITNESS: Where you plead guilty but you are not guilty, or you say that you are not guilty. No, at one point I am sure he said, "I can plead, you know, under North Carolina, and I would not be sentenced. I will get probation."

I am sure he told me that, but, you know, at that time it was — I don't know, it was kind of like over.

Q I beg your pardon?

A It was over then. If I am not mistaken, he may have pleaded that same day. If I am not mistaken, the call came in in the afternoon and he made up his mind and that was the end of it.

Q In any event, in the call from Mr. Block, Mr. Block did not say, in complete, unqualified language, that Judge Fay had conveyed a message to Mr. Sonnett through Mr. Block to Mr. Matthews that the defendant Matthews, if he went to trial and were convicted, would get at least ten years?

A He said specifically that he had a discussion with Mr. Sonnett and Mr. Sonnett had talked to Judge Fay and Judge Fay had indicated to him that if Matthews was found guilty on any one count he would give him at least ten years in jail.

A Yes, sir.

Q And Mr. Mandina, in your affidavit you said this, and I would like to ask you if you still believe that statement to be true:

"I know from my own personal knowledge from the discussions with Mr. Block on January 7th as hereinabove related and thereafter with Mr. Matthews, that Mr. Matthews would never have entered a plea of guilty to any count of the indictment as he was innocent of all counts thereof, and only did so on the alleged threat relayed by Assistant U.S. Attorney Neal Sonnett to Irwin Block, Mr. Matthews' attorney, and thus to Mr. Matthews, that a ten-year sentence awaited him if convicted."

Do you believe that is still a true statement?

A Unequivocally, I believe it.

MR. GREENFIELD: No further questions.

THE COURT: Do you wish to cross on that? It seems like it was a new area.

MR. BATES: Yes, your Honor, I would.

RECROSS EXAMINATION

BY MR. BATES:

Q What is the basis of that statement?

A Just prior to the call, Mr. Bates, we had thoroughly discussed and decided, because we were partners for a number of years, that certainly it was probably the most, obviously the most damaging and toughest thing that ever happened to Carey during our partnership. The other defendants who prior to this, particularly Ben Dobson, had indicated that they would support Matthews and that their testimony would be favorable to him, and particularly Dobson. We could not find him the last few days before trial. He . . . .

Q Mr. Matthews, on the 7th, when you received the telephone call from Mr. Block, what conversation did you have with him?

A He came on the phone extremely perturbed and upset. The whole week he had been upset and perturbed. There was some 10,000 documents and he was terribly concerned about whether or not we were ready for trial. He came on the phone and he stated that he had just had a conference with Neal Sonnett and he said that he was very upset, that Sonnett had related to him that Judge Fay had threatened a ten year sentence to me if I went to trial, the only person going to trial, and if I was convicted.

That is what — I don't know how I can characterize it — I accepted it as a threat to put me in jail for ten years if I was convicted on any count or any number of counts.

Q Did he express it as an impression that he had gained from Sonnett or did he express it as a statement that Sonnett had told him that such and such information was conveyed to him by Judge Fay?

A He flat out stated unequivocally. . . .

. . . .months to run on the five years, and after which time you will be entitled to be reinstated to the Florida Bar, if the Court sees fit to vacate your plea, and permit you to enter a plea of not guilty at this time, are you ready to face the rigors of a trial and to do those things that are necessary to defend yourself and prove your innocence?

A Absolutely. I am prepared to go to trial within ten days. I think that I have a right to a trial. After all, that is all that I am asking is a trial. I think the public has a right for me to be tried and they have a right to know whether I am innocent or guilty. I think the Court has a right to know whether they have been put upon in this case, as they have, in my opinion.

Q Mr. Matthews, did you have anything whatsoever directly or indirectly to do with the mailing or the preparing or the distribution of a proxy statement under which you were charged on Count XIV?

MR. BATES: Objection, Your Honor.

THE COURT: Sustained.

MR. GREENFIELD: No further questions.

THE COURT: Cross examination. . . .

A Yes, sir.

Q And also in causing individuals to change their testimony?

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No. 78-406

In the Supreme Court of the United States

OCTOBER TERM, 1978

C. CAREY MATTHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-28) is reported at 569 F. 2d 941.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1978, and a petition for rehearing was denied on May 11, 1978. On July 31, 1978, Mr. Justice Powell granted an extension to file the petition for a writ of certiorari to and including September 9, 1978, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).[1]

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[1]Petitioner incorrectly cites 28 U.S.C. 2101(c) and Rule 19(b) of the Rules of the Supreme Court as the basis for jurisdiction in this Court.

QUESTIONS PRESENTED

1. Whether petitioner's plea of guilty was coerced by a threat, allegedly conveyed by the Assistant United States Attorney, that the trial judge would sentence petitioner to at least ten years' imprisonment if he refused to plead guilty and was subsequently found guilty by a jury.

2. Whether petitioner was denied a fair hearing on his coercion claim by pre-hearing extrajudicial discussions between two witnesses concerning some of the events at issue.

STATEMENT

1. On January 7, 1972, pursuant to a plea bargain, petitioner pled guilty in the United States District Court for the Southern District of Florida to one count of causing the distribution of a false and misleading proxy statement, in violation of 15 U.S.C. 78j(b) and 78ff(a) and 18 U.S.C. 2.[2] Petitioner was sentenced to five years' probation.

On June 10, 1975, petitioner filed a motion to vacate his sentence and set aside his guilty plea, pursuant to 28 U.S.C. 2255, contending that his guilty plea had been coerced and that there had been an insufficient factual basis for the plea. The motion was supported by affidavits given by the attorney who represented petitioner at the time of the guilty plea and by petitioner's former law partner concerning the circumstances of the alleged coercion: the government filed an affidavit given by the Assistant United States Attorney who had prosecuted the

[2]Petitioner pled guilty to Count 14 of a 19-count indictment; in return, the government agreed to dismiss the remaining counts of the indictment and to recommend a sentence of five years' probation. When petitioner pled guilty, he stated that he did not believe he had committed a crime, but wished to enter a plea of guilty in accordance with this Court's decision in *North Carolina* v. *Alford*, 400 U.S. 25 (1970). See the transcript of petitioner's entry of a guilty plea (hereafter "G.P."), dated January 7, 1972, at 3-4.

case. The district court denied the motion without an evidentiary hearing, finding that the transcript of the guilty plea proceedings established that the plea had been freely and voluntarily made and that it was supported by a sufficient factual basis (Pet. App. 1-10).

The court of appeals reversed and remanded. *Matthews* v. *United States*, 533 F. 2d 900 (5th Cir. 1976), cert. denied, 429 U.S. 1121 (1977). Although the court agreed with the district court that there was an adequate factual basis for the plea, the court of appeals held that petitioner was entitled to an evidentiary hearing on the claim that his plea had been coerced by a threat, allegedly conveyed by the prosecutor in the case, that the trial judge would sentence petitioner to at least ten years' imprisonment if he refused to plead guilty and was subsequently found guilty by a jury (Pet. App. 11-18).

2. On September 2, 1976, following the remand from the court of appeals, the district court conducted an evidentiary hearing on petitioner's allegation of coercion.[3]

Neal Sonnett, a former Assistant United States Attorney who had been in charge of the prosecution, testified that he told Irwin Block, petitioner's attorney at the time of the guilty plea, that the government would recommend a substantial jail sentence if petitioner was convicted after a trial (Tr. 13-14)[4] and that he thought the trial judge would look "dimly" on petitioner's conduct (Tr. 40, 43-44). Block requested that Sonnett meet alone with the judge in his chambers, while Block waited

[3]The district judge who conducted this hearing was not the judge who had sentenced petitioner (Pet. App. 23).

[4]"Tr." refers to the transcript of the September 2, 1976, evidentiary hearing.

outside, to see if the judge would accept an *Alford* plea from petitioner (Tr. 14-15).[5] Accordingly, Sonnett informed the judge of Block's request and told him that if petitioner pled guilty the government would recommend probation. The judge replied that he would accept an *Alford* plea and would decide whether to follow the government's recommendation after he reviewed a presentence report (Tr. 15-16). As soon as Sonnett left this meeting, he informed Block of the judge's statements and expressed his view that it would be in petitioner's "best interest to plead guilty rather than face the possibility of a long term of incarceration which would be recommended by the Government" (Tr. 15).

Sonnett further testified that the judge had not indicated to him what sentence he planned to impose; and Sonnett denied that he had ever told Block or suggested to him in any manner that the judge had given any such indication (Tr. 16, 21, 23-24, 39-40, 43-46). Sonnett added that he understood how statements he might have made on several occasions to the effect that "the court looked dimly on these kind of crimes" could have caused "a misimpression as to what [he] said" to Block (Tr. 43-44).

In his testimony at the hearing on remand, Block stated that on occasions before Sonnett's discussion with the judge about the proposed *Alford* plea, Sonnett had speculated that petitioner would get "substantial time" if convicted, that Sonnett repeated this speculation after his conversation with the judge about the plea, and that Block then "got the impression that there was some indication, no threats, no statements, but some indication from whatever was said [regarding how] the judge felt about this case * * *" and "that there would be a long

[5]Block's testimony agrees with Sonnett's account of the circumstances leading to the meeting (Tr. 61-62).

sentence" (Tr. 63, 64-65, 78-80). Block denied, however, that Sonnett had ever made any threats or ever conveyed any threats or any statements by the trial judge concerning petitioner's likely sentence, and he characterized Sonnett's remarks as "just lawyer talk" (Tr. 57, 63-65, 67, 71-73, 76). Following his meeting with Sonnett, according to Block's testimony, Block telephoned petitioner and told him that, based upon his conversations with the prosecutor, he had an "impression" that there was a possibility of a substantial prison sentence if petitioner were to be convicted (Tr. 66-68, 70-72, 79-81). Block also told petitioner that he did not consider Sonnett's statements a threat and that he did not know if the judge had said anything about a long sentence (Tr. 66, 71-72, 80).

Philip Mandina, petitioner's former law partner, who overheard Block's telephone conversation with petitioner on an extension phone, testified that Block told petitioner that "Sonnett had indicated to him [Block] that [the judge] had indicated to Mr. Sonnett that if [petitioner] was convicted * * * he would get at least * * * ten years in prison" (Tr. 89, 98).[6] Mandina stated that Block also told petitioner he did not think that the judge made the statement and Mandina agreed (Tr. 95-96, 99, 102).

Petitioner testified that Block stated that the prosecutor had told Block that the judge had threatened to impose a ten-year sentence if petitioner was convicted after a trial (Tr. 109-110, 112). Petitioner stated that he had believed the threat and that it was the "only reason" he accepted the plea agreement (Tr. 112-115, 120).

[6]Block denied making this statement (Tr. 71). Although Block's 1975 affidavit stated that Sonnett had advised him that the trial judge had "indicated" to Sonnett that petitioner "would be sentenced to a substantial term of years" if he "went to trial and was convicted," Block testified that his affidavit was true only "as far as it goes" (Tr. 57) and that it required "some elaboration" (Tr. 55).

3. After this evidentiary hearing, the district court denied petitioner's motion for vacation of his sentence, finding that the prosecutor had not conveyed any threats regarding sentencing to petitioner's counsel, and that petitioner's unfounded subjective appraisal of his attorney's conversation with the prosecutor was immaterial (Pet. App. 19-20). The court of appeals affirmed (Pet. App. 21-28).

ARGUMENT

Petitioner contends that his guilty plea was coerced by a threat, conveyed by the prosecutor, that the trial judge would impose at least a ten-year jail sentence if petitioner were convicted after a trial, and he also contends that he did not receive a fair hearing on this claim. Both contentions are without merit.

1. The court of appeals concluded that the "clear implication" of the district court's factual finding "is that Sonnett did not convey a threat [of a lengthy sentence] to Block, nor did Block transmit such a threat to Matthews" (Pet. App. 28). "Based on a careful review" of the hearing testimony, the court of appeals further determined that "the district court's finding is not clearly erroneous" (Pet. App. 27). Petitioner's contention (Pet. 20-29) that a threat was in fact conveyed to him by Sonnett through Block thus presents a factual issue that does not warrant further review in this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

In any event, the record clearly supports the findings of the court below. As the Statement shows (pages 4-5, *supra*), both Sonnett and Block denied that Sonnett had conveyed any threat from the judge concerning petitioner's likely sentence, and Block testified that, although he had conveyed his "impression" of Sonnett's remarks, he did not tell petitioner that the judge had made any threats. Petitioner and his former law partner, Mandina, were not parties to the conversation between Sonnett and Block outside of the trial judge's chambers, so they could give no credible testimony as to that. Although their testimony conflicted with that of Block regarding Block's statements to petitioner, the district court was free to credit Block's testimony that no threat was conveyed; and the court of appeals, obligated to give "due regard to the opportunity of the trial court to judge of the credibility of the witnesses" (Fed. R. Civ. P. 52(a)), properly upheld this finding since it was not clearly erroneous. *United States* v. *Oregon Medical Society*, 343 U.S. 326, 332 (1952); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co., supra*, 336 U.S. at 275.[7]

In sum, on the basis of the facts found in this case petitioner can reasonably claim no more than that the prosecutor speculated, perhaps erroneously, about the length of the sentence petitioner might receive if he went to trial and was convicted by the jury, and that petitioner misconstrued the prosecutor's speculations and pled guilty, fearing that he might otherwise receive a long sentence. A prosecutor's speculations concerning the possible severity of a sentence are not grounds for invalidating a guilty plea. See, *e.g.*, *United States* v. *Battle*, 467 F. 2d 569, 570 (5th Cir. 1972); *Holt* v. *United States*, 329 F. 2d 368, 371 (7th Cir. 1964), cert. denied,

[7] Among the circumstances bearing on the credibility of petitioner's claim that he had been told of a threat by the judge were his denial at the time of his guilty plea that any threats had been made (G.P. 4, 6-7) and the fact that he did not raise this claim until after his motion to terminate his probation was denied, more than three years after the plea was entered (Tr. 117-118). A circumstance pertinent to the evaluation of Mandina's testimony regarding Block's alleged statements to petitioner is that Mandina had, according to his account (Tr. 94), learned from the trial judge a year after petitioner entered his plea that the judge had made no threats; yet Mandina apparently did not come forward with this evidence contradicting what he said Block had told petitioner until more than two years later, when petitioner filed his motion to vacate his sentence.

379 U.S. 992 (1965). Nor is a guilty plea rendered invalid by the fact that the defendant was induced to enter the plea by fear of a severe penalty. *Brady* v. *United States*, 397 U.S. 742, 749-751 (1970); *Micklus* v. *United States*, 537 F. 2d 381, 382 (9th Cir. 1976).[8]

2. Petitioner claims (Pet. 8-9, 30-31) that the hearing on his coercion allegation was "a farce and a travesty of justice" (Pet. 8) because Sonnett and Block met shortly before the 1976 hearing and tried to refresh their memories concerning the events that had occurred more than four years before.[9] This claim is insubstantial.

Sonnett himself volunteered the information that he and Block had discussed the matter, explaining (Tr. 43):

> If I may say, Judge, since this controversy concerning the two affidavits of Mr. Block and myself has come up, I want to clearly state that Mr. Block and I have had several conversations since that controversy.
>
> I think that we have a fairly decent recollection of this case at this point as to what took place, although neither one of us remember the words * * *.[10]

---

[8]Because the record shows that no threat was made by the trial judge who accepted petitioner's guilty plea, *United States* v. *Tateo*, 214 F. Supp. 560 (S.D.N.Y. 1963), relied on by petitioner (Pet. 27-28), is inapposite. In *Tateo*, the court told the defendant in the middle of his trial that if he refused to plead guilty and proceeded with his trial and was convicted, the court would sentence him to life imprisonment on one count and consecutive maximum sentences on each of the four other counts. For the same reason, *Ramsay* v. *New York*, cert. granted, No. 77-6540 (Oct. 10, 1978), which concerns participation by the court in the plea bargaining process, has no bearing on this case.

[9]Sonnett had left the United States Attorney's office and was in private practice at the time of the hearing at issue.

[10]The affidavits referred to by Sonnett were given at the time petitioner's motion to vacate his sentence was first considered by the district court (see pages 2-3, *supra*, and Pet. App. 14).

Petitioner's counsel, who had not moved for a pre-hearing sequestration order, had ample opportunity to cross-examine Block and Sonnett on these conversations if he perceived any prejudice resulting from them. In any event, it is difficult to see how these conversations, *per se*, could render the hearing constitutionally inadequate, any more than would the fact that a year before, when petitioner first filed his motion to vacate his sentence, petitioner's representatives had transmitted to Block for his signature a "multi-page affidavit" recounting a version of the events in question that could have influenced Block's recollection of those events, even though he thereafter prepared his own affidavit (Tr. 65). See *United States ex rel. Clark* v. *Fike*, 538 F. 2d 750, 757-758 (7th Cir. 1976), cert. denied, 429 U.S. 1064 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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